TREATISE

OF

EQUITY.

VOL. I.



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TREATISE

OF

EQUITY.

BY JOHN FONBLANQUE, Esq.

BARRISTER AT LAW.

SECOND EDITION, WITH ADDITIONS.

VOLUME THE FIRST.

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TO THE

RIGHT HONOURABLE

EDWARD LORD THURLOW,

BARON THURLOW OF ASHFIELD,

IN THE COUNTY OF SUFFOLK,

THIS WORK

IS.

WITH HIS LORDSHIP'S PERMISSION,
RESPECTFULLY DEDICATED.

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PREFACE.

SINCE the publication of the last edition of this Treatise, I have been kindly favoured with some of the Manuscripts of the late Henry Ballow, Esq. which, with his library, he bequeathed to the late Earl of Camden. One of the manuscripts contains a very large portion of the Treatise of Equity, revised and corrected apparently for the purpose of publication; a circumstance which, though it may not do away all doubt of Mr. Ballow's having been the author of the work, must considerably strengthen the opinion which has generally prevailed that he was.

Mr. Ballow appears, from the admissions to the Bar by the Honourable Society of Lincoln's-Inn, to have been called in Michaelmas Term 1728. What was his then age, or what had been his previous course of education and study,

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are points upon which the Editor felt himself particularly anxious to procure information, as a knowledge of the course of reading which had produced so profound a work, before its Author was of ten years standing at the Bar, might have stimulated, as well as directed, the industry of the Student.

The work was published in 1737, not only anonymously, a circumstance which of itself materially lessens the authority of law publications, but also without refer-The Learned might, indeed, by the perusal of it, preserve or revive their knowledge; but, to the Student, from the want of references, it was of little use: its contents were drawn from fources fcarcely known to him; he might, indeed, adopt the impressions which the work conveyed, but he was still ignorant of the authority whence those impressions were received. The Author, perhaps, apprehended, that references to that profound erudition which is every where traceable in the work, might to some have appeared an oftentatious parade of learning, and from the apprehension of offending

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ing the taste of some, may have submitted to a mode of publication which materially lessens the utility of his work to others. To supply that omission, was all the Editor originally proposed; but, as he advanced, he became sensible, that, from the improvements which have taken place in our system of Equity, more might reasonably be expected from him.

In some instances, what the Author had stated as a principle, the Editor found, with reference to more modern decisions. fcarcely fustainable as a general rule; and, in other cases, he found, that what the Author had stated as a mere precedent, had, from its frequent adoption, become the doctrine of the Court. To incorporate fuch additional matter into the text, was the first plan which suggested itself to the Editor; but he found it impracticable; to recast the whole work, would have been injustice to the Author; and, from fuch confiderations, the Editor was compelled to adopt the form in which fuch additional matter is now submitted; a form in some respects certainly inconvenient; but, as it does not injure the original ginal work, the Editor hopes it will meet with indulgence.

The Editor has purposely refrained from entering into further particulars refpecting the reputed Author. Should he hereafter acquire information, which may remove all doubt as to the Author, and an opportunity offer of his communicating fuch information to the Profession, he shall be happy in the opportunity of accompanying fuch information with fuch other particulars as he may be able to collect concerning him. The Editor has also refrained from adverting to the nature of the subject of the work, as every intelligent mind must be sensible of its importance, though the most enlightened and enlarged is scarcely equal to the duly expatiating upon it.

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E Q U I T Y.

BOOK THE FIRST.

CHAP. I.

Of the Nature of Equity.

SECTION I.

IT is plain that law is a moral science (a), since the end of all law is justice; and justice, in the most extensive sense of the word, differs little from virtue itself, for it includes within it the whole circle of virtue. Yet the common distinction between them

⁽n) Law, in its largest and most comprehensive sense, may with great propriety rank as a moral science; but in its more limited and usual acceptation, as applying to the laws of any particular country, it would be distact. I.

B ficult

them is, that the same, which, considered positively and in itself, is called virtue, when considered relatively and with respect to others, has the name of justice (b). But justice, in a proper and limited sense, as being itself a part of virtue, is confined to things simply good or evil, and consists in

ficult to establish its claim to such distinction. For there certainly are many moral obligations (beneficence, gratitude, charity, &c.) which the law does not enforce or enjoin, and many violations of morality which it does neither punish nor restrain; " for legal "obligations are from their nature more circumscribed than moral duties." Per Lord Loughborough, Parfons v. Thomson, I Bla. T. Rep. 527.

A further objection to its claim to rank as a moral fcience, may be drawn from the contrariety which appears to prevail in the laws of different countries, and from the changes which have from time to time taken place in the laws of every country; whereas a moral fcience must be founded on the immutable dictates of reason, uniform in its object, and as uniform in the means employed for its attainment.

(b) Puffendorff divides justice into universal or imperfect, and particular or perfect. The first, he conceives to be the discharge of every duty, though the same be not exacted by force or rigour of the law; the latter, he defines to be the merely doing that which may be strictly demanded of us. Law of Nature and Nations, b. 1. c. 7. s. 89. Elementorum Jurisprudentiæ universalis,

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a man's taking fuch a proportion of them as he ought; and this is usually divided into two forts: the one distributive of things to be divided amongst those who are to be united in civil fociety; the other commutative, or that which governs contracts (1). The reason of this difference is, that, in the one, respect is had of the perfons; but in the other, only of the damage done. For it is the office and duty of a judge to make an equality between the parties, that no one may be gainer by another's loss; but, in distributive justice, the same equality is required of both; that neither equal persons have unequal things, or unequal persons things equal.

(1) Puffendorff's Law of Nature and Nations, b. 1. c. 7.

falis, lib. 1. definitio 17. 3. 1. Multis enim cafibus evenit ut obligatio fit in nobis et nullum jus in alio. Gro. lib. 2. c. 11. f. 3. fee alfo Lord Bacon's readings on the Statute of Uses 306, and Pothier Traité des obligations, article preliminaire.

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SECTION II.

UT our present inquiry is restrained to that first fort of justice which governs contracts; for, as an action or fuit, the remedy the law hath provided for obtaining justice, is but a legal demand of some right. and all civil rights must arise from obligations, and these obligations are founded on compacts (1); it follows, of necessity, that the proper subject of law is contracts, and that juffice is the chief end of law, which teaches the performance of them. Now contracts are either voluntary or involuntary (2). The voluntary, are buying and felling, letting and hiring, deposits and interest of money, and the like: the involuntary, are theft, murder, rapine, and all other heinous offences, whether fecret or violent. But we fhall waive the treating of these any further here, fince it is the voluntary contracts only that we shall have occasion to consider, and fuch especially as are most in use amongst us: for of torts (c) and crimes, Chancery has

(1) Bracton de Actionibus, 98. b. 99, a.

(2) Puffendorff's Law of Nature and Nations, b. 1. c. 7. f. 11. Vinnius, 593.

(c) Though it be generally faid that courts of equity have not any jurisdiction in matters of tort, yet, as it is their province to enforce what good conscience requires,

no proper jurisdiction (d). And we do not mean to confine ourselves to the municipal laws only, but to have chiefly in view that

quires, Lord C. Cowper would not allow the reprefentative of a tenant who had committed waste, (which is a private tort,) by digging ore, to retain the profits, observing, that it would be a reproach to equity to fay, where a man has taken my property, as my ore or timber, and disposed of it in his life-time, and dies, "that in this case I must be without remedy." Bishop of Winchester v. Knight, 1 P. Wms. 407. And yet there could be no remedy at law, nam actio personalis moritur cum persona.

(d) "The freedom of our conflitution will not permit " that, in criminal cases, a power should be lodged " in any judge to conftrue the law otherwise than ac-" cording to the letter. This caution, while it ad-" mirably protects the public liberty, can never bear " hard upon individuals. A man cannot fuffer more " punishment than the law affigns, but he may suffer less. The laws cannot be strained by partiality to " inflict a penalty beyond what the letter will war-" rant: but in cases, where the letter induces any ap-" parent hardship, the crown has the power to par-" don." 1 Blackstone's Com. Introd. f. 3.

And as courts of equity cannot take cognizance of criminal matters, neither have they, " originally and " strictly, any restraining power over criminal profe-" cutions. But where a bill is brought to quiet pof-" fession, if, after that, the plaintiff prefers an indict-" ment for a forcible entry, which is of a double " nature.

natural justice and equity, which ought to be the ground-work and foundation of all laws, and which corrects and controls them when they do amiss (e).

"nature, as it partakes of a breach of the peace, and is also a civil right, the court, in which the suit is instituted, may stop the proceedings upon such indictment; for when parties submit their right to the court, they have certainly a jurisdiction, and may interpose." P. Lord Hardwicke, the Mayor and Corporation of York v. Sir Lionel Pilkington, 2 Atk. 302.

(e) In every well-constituted government, there is fomewhere lodged the power of supplying that which is defective, and controlling that which is unintentionally harsh, in the application of any general rule to a particular cafe. This power, however, must not be confidered as a power to make a new law, or to dispense with any established law, the object of which is clearly defined, and its provisions distinctly declared, with reference to all the circumstances which belong to the This distinction is anxiously referred to both by Grotius and Puffendorff. The former defines equity to be "Correctrix ejus in quo lex propter universalitatem " deficit:" " fit autem ea correctio non tollendo legis obligationem, fed declarando legem in certo cafu non " obligare." Grotius de Equitate, f. 12. Whereas he defines the power of dispensing with the law, " Virtus " voluntatis in eo qui potestatem habet ad tollendam " legis obligationem in personis, rebus, aut factis, " particularibus aut fingularibus, quatenus id fieri po-" test fine imminutione justitiæ aut publicæ utilitatis." " Differt

"Differt hæc multum ab equitate, hæc enim obliga"tionem tollit, equitas vero nullam esse legis obligati"onem declarat." Grotius de Indulgentiâ, s. 1. 4.
Puffendorss having defined equity, "Ut prudenter
declaretur casum aliquem peculiaribus vestitum circumstantiis a legislatore sub generali lege non suisse
comprehensum;" proceeds, "est et alia significatio
aquitatis quâ ex equo et bono disceptantur leges
quæ legibus civilibus expresse non definiuntur, sed
judici vel arbitro et collatione juris naturæ aliarumque legum civilium decidendæ relinquuntur. Dispensatio autem est quando singuli in certo casu obligatione juris civilis quâ per summam potestatem solvuntur qui alias tenebantur." Elementorum Jurisprudentiæ universalis, lib. 1. s. 22, 23.

The same distinction seems to have bounded the jurisdiction of the Roman Prætor, who is stiled, "Custos" non conditor juris;" "juvare, supplere, interpretari, mitigare, jus civile potuit; mutare vel tollere" non potuit." Digest, lib. 1. tit. 1. 7. Taylor's Civil Law Prætor's Edicts. See also Co. Litt. 24. b.

To fix the precise period of the origin of our courts of equity, the jurisdiction of which is separate and distinct from that of our courts of law, were an inquiry of very considerable difficulty; and it is sufficient that we find them established in the earliest periods of our legal constitution, exercising a jurisdiction, regulated by principles and precedents, in all those cases, which, according to Grotius, "lex non exacte definit, sed arbitrio" boni viri permittit." The charge which has been frequently made against this jurisdiction, as being an innovation upon the jurisdiction of courts of law, seems to have very little to support it. Sir Rob. Atkyns has brought together the principal objections to the exercise

of fuch a jurisdiction; but though evidently prejudiced, he has been, in the course of his inquiry, compelled by facts to furnish a very sufficient answer to the objections upon which he seems to have relied. Jurisdiction of the Court of Chancery.

But it is not the intention of the editor of this treatife to revive a discussion, from which no real advantage can be derived. They, however, who are disposed to inform themselves, as to the grounds taken by the friends and opponents of the jurisdiction of equity, may gratify their curiosity by consulting the several works referred to by Mr. Hargrave, in his Law Tracts, P. 344.

It may not, however, be improper to observe, that courts of law are equally with our courts of equity chargeable with having extended their jurisdiction by the aid of fiction; and that, if courts of equity, professing to proceed upon the ground of the party being remediless at law, do take cognizance of some matters, of which courts of law would now take cognizance, they will be found originally to have derived their jurisdiction from the narrow decisions of courts of law; and, having once strictly possessed it, courts of law ought not to be at liberty at pleasure to deprive them of it.

SECTION III.

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FQUITY, therefore, as it stands for the whole of natural justice, is more excellent than any human inflitution; neither are positive laws, even in matters seemingly indifferent, any further binding than they are agreeable to the law of God and nature (1). But the precepts of the natural law, when enforced by the laws of man, are so far from losing any thing of their former excellence, that they thence receive an additional strength and fanction; yet, as the rules of the municipal law are finite, and the subject of it infinite, there will often fall out cases which cannot be determined by them; for there can be no finite rule of an infinite matter perfect. So that there will be a necessity of having recourse to the natural principles, that what was wanting to the finite may be supplied out of that which is infinite (2). And this is properly what is called equity, in opposition to strict law; and seems to bear fomething of the same proportion to it in the moral, as art does to nature in the material world. For, as the univer-

(1) Bla. Com Introd. f. 2.

(2) Grotius ac Equitate. (. 5. Republique de Bodin, tom. i). fal laws of matter would, in many inftances, prove hurtful to particulars, if art were not to interpose, and direct them aright; so the general precepts of the municipal law would oftentimes not be able to attain their end, if equity did not come in aid of them (f). And thus, in Chancery,

(f) In the preceding section we have attempted to give a general definition of equity; we shall now endeavour to surnish an outline of the jurisdiction of those courts which profess to proceed upon its principles. The jurisdiction exercised by courts of equity may be considered in some cases as affishant to, in some concurrent with, and in others exclusive of, the jurisdiction of courts of common law.

It is affistant to the jurisdiction of courts of law; 1st, By removing legal impediments to the fair decifion of a question depending in courts of law; thus if an ejectment be brought to try a right to land in a court of common law, a court of equity will restrain the party in possession (unless he has an equal claim to the protection of a court of equity) from fetting up any title which may prevent the fair trial of the right, as a term for years outstanding in a trustee, lessee, or mortgagee. Harrison v. Southcote, 1 Atk. 540. So also equity will, under circumstances, restrain a party from infifting upon the invalidity of a devise. Anon. 1 Ch. Ca. 267. 2dly, By compelling a discovery which may enable them to decide. See B. 6. c. 3. 3dly, By perpetuating testimony, when in danger of being lost, before

Chancery, every particular case stands upon its own particular circumstances (3):

(3) 2 Ch. Ca. 93.

fore the matter to which it relates can be made the fubject of judicial investigation. The earl of Suffolk v. Green, 1 Atk. 451. D. of Dorset v. Serjeant Girdler, Pre. Ch. 531. Creffett v. Mytton, 3 Bro. Ch. Rep. 481. it is, however, material to observe, that a bill to perpetuate testimony will lie, though the plaintiff might proceed at law if he alledge by his bill, and by an affidavit annexed to the bill, any circumstance, by means of which the testimony may probably be lost, Phillips v. Carew, 1 P. Wms. 117. as that the witness to be examined is the only witness to a material fact, Shirly v. Ferrers, 3 P. Wms. 77. Hankin v. Middleditch, 2 Bro. Ch. R. 641. It may also be faid to be affistant, by rendering the judgments of courts of law effective, as 1st, by providing for the fafety of property in dispute pending a litigation: in some cases by ordering the property to be brought into court, or to be collected by a receiver; in other cases by restraining the party in whose hands it is, from exercising any power over it, or parting with it until further order: adly, by counteracting fraudulent judgments, &c.; and adly, by putting a bound to vexatious and oppressive litigation. It exercises a concurrent jurisdiction with courts of law, in most cases of fraud, accident, mistake, account, partition, and dower. claims an exclusive jurisdiction in most matters of trust and confidence; and "wherever upon the principles of universal justice, the interference of a court of judicature is necessary to prevent a wrong, and the positive law is filent." The established merit of Sir John Mitford's Treatise on the Pleadings in a Suit of Chancery (a work,

from

and although the common law will not decree against the general rule of law, yet

from which the editor has, in this division, and in many other particulars, drawn very confiderable affistance), will of course have rendered its contents too familiar to every practitioner in our courts of equity, to render references to it in general necessary.

To purfue this division of the jurisdiction of courts of equity with that minuteness which is necessary to a particular acquaintance with its powers, would lead to an investigation too extensive for the nature of this treatife. It may, however, be expected, that some notice should be taken of the general objection that is urged against the claims of courts of equity to a concurrence of jurisdiction in some cases with courts of This concurrence of jurisdiction may, in the greater number of cases in which it is exercised, be justified by the propriety of preventing a multiplicity of luits; for as the mode of proceeding in courts of law requires the plaintiff to establish his case, without enabling him to draw the necessary evidence from the examination of the defendant, justice could never be attained at law in those cases where the principal facts to be proved by one party are confined to the knowledge of the other party: in fuch cases, therefore, it becomes necessary for the party wanting such evidence to refort to the extraordinary powers of a court of equity, which will compel the necessary discovery; and, the court having acquired cognizance of the fuit, for the purpose of discovery, will entertain it, for the purpose of relief, in most cases of fraud, account, accident, and mistake; and for other reasons will entertain suits for partition

yet Chancery doth, so as the example introduce not a general mischief (g). Every matter,

partition and dower, though discovery be not necessary to the plaintiff's case.

The cafe (and, I believe, the only cafe) in which fraud cannot be relieved against in equity, concurrently with courts of law, though discovery be fought, is the case of fraud, in obtaining a will, which, if of real estate, fince the case of Kerrick v. Bransby, 3 Brown's Parl. Cases, 358, is constantly referred to a court of law in the shape of an iffue devisavit vel non, and which, if of personal estate, is cognizable in the spiritual court. That courts of equity have a concurrence of jurisdiction with courts of law in all other matters of fraud, and will not lay down rules restrictive of such jurisdiction, but will proceed in every case of fraud upon its particular circumstances, see Gifford v. Oufe, 27 Feb. 1739, Ch. White v. Huffey, Pre. Ch. 14. Hungerford v. Earl, 2 Vernon, 261. Colt v. Woollaston, 2 P. Wms. 156. Stent v. Baillis, 2 P. Wms. 220. and it may be material to remark, that though courts of equity cannot fet afide a will for fraud, they can convert the person practising the fraud, if he claim benefit under the will, into a truftee (at least to the extent of fuch benefit,) for the person injured by the fraud. Marriott v. Marriott, Gilb. Rep. 203. fee page 64, Vol. 2. B. 3. Part 1. c. 1. f. 3.

The jutisdiction exercised by courts of equity in matters of account, is, in many eases, bounded by the discovery; as where a suit is instituted for an account of waste of timber, without praying an injunction, the plaintiff

matter, therefore, that happens inconfistent with the design of the legislator (b),

plaintiff cannot have a decree for relief. Jefus College v. Bloome, 3 Atk. 262. Piers v. Piers, 1 Vez. 521. But See Lee v. Alston, 1 Bro. Ch. Rep. 194. 3 Bro. Ch. Rep. 37. in which an account of timber felled was decreed, though no injunction appears by the report of the case to have been prayed. Where the bill feeks an account of ore dug, the court will decree it. Bishop of Winchester v. Knight, 1 P. Wms. 406; because the working of a mine is a kind of trade. Story v. Lord Windsor, 2 Atk. 630. Yet, even in that case, the plaintiff must shew a possession. Sayer v. Pierce, I Vez. 232. Neither will equity, in all cases, decree an account of mesne profits, for " where a man has title to the possession of lands, " and makes an entry, whereby he becomes entitled to " damages at law for the time that poffession was de-" tained from him, he shall not, after his entry, turn " that action at law into a fuit in equity, and bring a bill for an account of the profits, except in the case " of an infant, or fome other very particular circum-" flances. P. Lord Keeper, Tilly v. Bridges, Pre. Ch. 252. Owen v. Apirce, 1 Ch. Rep. 17. See Delver v. Hunter, Bunb. 57. The particular circumstances excepted by the Lord Keeper, in laying down this rule, extend to all those cases, which involve an equity which the plaintiff cannot make available at law. Coventry v. Hall. 2 Ch. Rep. 134. Duke of Bolton v. Deane, Pre. Ch. 516. Dormer v. Fortescue, 3 Atk. 129, 130. Townsend v. Ash, 3 Atk. 336. Norton v. Frecker, 1 Atk. 524. See also Curtis v. Curtis, Rolls, 2 Brown's

or is contrary to natural justice, may find relief here. For no man can be obliged

Rep. Ch. 622. But the interference of courts of equity is peculiarly effective in correcting errors, or detecting fraud in accounts relied upon as stated and settled, by allowing the plaintiff in the case of specific error alledged and proved to surcharge and falsify, and in the case of fraud opening the whole account, Vernon v. Vaudey 2 Atk. 119. See also Roberts v. Kussin, 2 Atk. 112. in which case it was held, that a party who is at liberty to surcharge and falsify is not merely confined to errors in fact, but may take advantage of errors in law.

The jurisdiction exercised by our courts of equity, in most cases of accident, presents a very striking instance of their anxiety to prevent innovation on the jurisdiction of courts of law: its interference being generally founded on fome circumstance, which prevents the party being relievable at law; as where a bond, or other instrument or fecurity, is lost, it will interfere, by compelling a discovery from the defendant, and will relieve upon fuch discovery; but the plaintiff is not entitled to any relief, upon a mere fuggestion that the bond, instrument, or fecurity, is lost, but is required, for the purpose of relief, to annex to his bill an affidavit to such effect. Anon. 3 Atk. 17. Mitford's Treatife, 112. And, as a further fecurity against innovation, it must appear, that the loss of the deed or instrument obstructs the plaintiff in feeking relief at law: for "the loss of a deed," fays Lord Hardwicke, " is not always a ground to come into a court of equity " for relief: for if there was no more in the case, although he is entitled to have a discovery of that, " whether

to any thing contrary to the law of nature (i); and indeed no man in his fenses can

"whether lost or not, courts of law admit evidence of the loss of a deed, proving the existence of it and its contents, just as a court of equity does. There are two grounds to come into equity for relief, annexing an affidavit to the bill. First, where the deed is destroyed or concealed by the desendant; and whenever that is the case, the plaintiff is entitled to have relief in this court, upon the reason in Lord Hunsdon's case, Hob. 109. Another is, where the plaintiff cannot recover at law, without making profert of the deed in pleading at law." Whitsield v. Fausset, 1 Vez. 392. Anon. 2 Atk. 61.

The judgment of the court of King's Bench, in Read v. Brookman, 3 Term Reports, 151, feems to have relieved the obligee from the necessity of coming into equity, upon the mere circumstance of the bond or instrument being lost, by allowing him to state such circumstance in his declaration, as a reason for not making profert of it. Upon this decision it may be observed that when courts of common law assume a concurrence of jurisdiction in cases of lost deeds, to a profert of which the defendant would be intitled, they appear to have forgotten that courts of equity, if a bill be framed for relief, as well as discovery, require an affidavit to be annexed to the bill that the deed alledged to be loft, is not in the possession or power of the This precaution prevents an obligee in a bond from enforcing the obligation without rifk of being affected by what might appear against him, were it produced. But in a court of law, if the bond contained

can be prefumed willing to oblige another to it (2). But if the law has determined a matter with all its circumstances, equity cannot intermeddle (3); and for the Chancery

tained a condition or indorfement of payment of interest, and the obligee wished to practise a fraud, he need only allege that fuch bond is loft, and the obligor might be without remedy, though the deed were actually in the possession of the obligee; unless indeed the obligor went into equity to enforce the production of it. This instance is one of those which tends to prove the wisdom of those who referring to the difference of mode of proceeding in the judicatures of law and equity, have anxiously endeavoured to keep separate and distinct the objects of their respective jurisdiction; and upon this case being cited in Chancery, as furnishing an objection to the plaintiff's fuit in equity, he being relievable at law, Lord Thurlow observed, that the court of King's Bench having determined to give relief in a case formerly relievable only in equity, was not a reason for excluding the ancient, peculiar, and at least concurrent jurifdiction of courts of equity. Atkinson v. Leonard, 3 Bro. Ch. Rep. 218. This concurrence of jurisdiction as to this kind of accident, may therefore be confidered to extend to all cases, in which the deed or instrument has been destroyed, or is concealed by the defendant, or has been loft by the plaintiff, though of the contents of such instrument the plaintiff has other evidence, of which he might avail himself at law. But where the relief fought in equity is upon the lofs of a bill of exchange, or promissory note, the plaintiff must, by his bill, offer to give fecurity, as an indemnity to the de-VOL. I. fendant,

(2) 1 Bla.
Com. Introd. f. 2.
Puffendorff's Elementorum
Jurifprudentiæ, l. 1.
f. 22.
(3) Kent. v.
Bridgeman,
Pre. Ch. 233.

(4) Cook v. Bampfield, 1 Ch. Ca. 228.
1 Bla. Com. Introd. f. 3.

Chancery to relieve against the express provision of an act of parliament, would be the same as to repeal it (4). Equity, therefore, will not interpose in such cases, notwith-

fendant, against any demand being made upon him in respect of such lost bill or note. Walmsley v. Child, 1 Vez. 341. As to other species of accident, see c. 5. s. s.

The jurisdiction exercised by our courts of equity, in matters of partition, is described by a very and justly eminent writer, as "a new compulsory mode " fprung up, and now fully established; by which it " is usual, upon a bill filed praying a partition, for the " court to iffue a commission to various persons, who " proceed without a jury. How far (he continues) " this branch of equitable jurisdiction, so trenching " upon the writ of partition, and wresting from a " court of common law its ancient exclusive jurisdic-"tion over this subject, might be traced, by examining " the ancient records of the court of Chancery, I know "not; but the earliest instance of a bill of partition I " observe to be noticed, is a case of the 40th Eliz. in " Tothill's Transactions of Chancery, tit. Partition. "According to the short report of this case, the court " interpoled from necessity, in respect of the minority " of one of the parties, the book expressing, that on "that account he could not be made party to a writ " of partition; which reason seems very inaccurate; " for, if Lord Coke is right, that writ doth lie against " an infant, and he shall not have his age in it, and after

notwithstanding accident or unavoidable necessity; so that infants had been bound by

" after judgment, he is bound by the partition." Co. Litt. 171. Hargrave's Co. Litt. 169. b. note 2.

Mr. Hargrave's opinion upon legal subjects is so defervedly entitled to influence the opinions of others, that I cannot refrain from observing, that a practice, fanctioned by a precedent of so early a date as the 40th Eliz. cannot reasonably be described as a new mode; particularly, when it is confidered, that there are very few, if any, reports of decisions in equity of an earlier The reason assigned by Tothill for this decision is, in the opinion of Lord Coke, infufficient to support it; and it will become still more so, when it is confidered, that an infant, when he attains his age, may shew cause against a decree of partition in equity, unless he be plaintiff in the suit. Lord Brook v. Lord and Lady Hereford, 2 P. Wms. 518. Tuckfield v. Buller, Ambler, 197. But though the reason affigned by Tothill fail, the decision is not destitute of principle to fupport it. Mr. Hargrave proceeds to observe, that "this was, in Lord Coke's time, probably a rare and "unfettled mode of compelling partition;" for, "that, " in a case in Chancery (Drury v. Drury, 1 Ch. Rep. " p. 26. 3d edit.), which was referred to the judges, on "a point of law between two co-parceners, that the " judges certified for iffuing the writ of partition be-" tween them, and that the court ordered one accord-"ingly; which, he prefumes, would fearcely have " been done, if the decree for a partition, and a com-" mission to make it, had been a current and familiar " practice." C 2 The

by the statute of limitations, if there had been no exception in the act. And although

The case of Drury v. Drury, appears to have been decided in the 6th of Charles the First; previous to which period, and even to the 40th of Eliz. equity had decreed an equal partition, where that made by the parties appeared to be unequal. Norse v. Ludlow, 32 Eliz. Toth. 155 .- Whether this partition was made by writ, commission, or consent, does not indeed appear; neither does it appear, in Drury v. Drury, upon what ground the writ of partition was decreed; but it is observable, in that case, that the question of partition was not referred to the judges; and that if it was, that they could not strictly, in such a case, have certified that a commission, which is an equitable process, ought to issue. The inference, therefore, drawn by Mr. Hargrave from this case, cannot be supported, unless it can be at least shewn, that the judges were called upon to decide not only the question of partition, but also to point out the mode to effect it. If, however, the authority of this cafe can in any degree fupport the doubt raifed upon it, I think it must be removed by an almost immediately subsequent case, 14 Car. 1. Babb v. Dudeny, Tothill's Transactions, tit. Partition, f. 155. in which case the court refused to interfere, not upon the ground that it had no jurifdiction, but because "the matter was but 9l. per annum." Norbury v. Yarbury: Toth. ubi fupra. Manaton v. Squire, 2 Freeman, 26.; in which case partition was confidered as cognizable in equity as at law.

To establish the origin of any branch of legal or equitable jurisdiction is always difficult, and seldom necessary, though in matters of apparent equity, as fraud, or breach of trust, precedents are not

necessary, provided the exercise of such jurisdiction is found to be conducive to the ends of substantial justice; and fuch will appear to be the tendency of the jurifdiction exercised by our courts of equity, in cases of partition, upon a reference to the difficulties which obstructed the mode of proceeding at common law: and though many of those difficulties are removed by the 8th and 9th W. 3. c. 31.; yet still, if " the titles " of the parties are in any degree complicated, it is ex-" tremely difficult to proceed at law; or where the " tenants in possession are seized of particular estates " only; for the persons entitled in remainder cannot " be bound by the judgment in a writ of partition." Mitford's Treatise, &c. p. 110. On these considerations, and the almost constant occasion that the parties have for a discovery, is founded this branch of equitable jurisdiction; in the exercise of which our courts of equity are constantly governed by an anxious attention to the legal title of the plaintiff: for though, at law, it be fufficient to alledge feifin, yet, in equity, the plaintiff must shew his title. Cartwright v. Pultney, 2 Atk. 380. And in order to prevent vexatious fuits, courts of equity have in some cases of partition refused to allow costs, none being allowed at law on the proceedings by writ, Metcalf v. Beckwith, 2 P. Wms. 376. Parker v. Gerrard. Ambl. 236. Mitford's Treatife 111. But see Calmedy v. Calmedy, 2 Vez. Jun. 568. in which a different practice is stated to have obtained, and in which case the costs of executing the commission and of the necessary proceedings in the cause, were decreed to be defrayed by the parties in proportion to their interests.

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not necessary; yet, in other cases, it is dangerous to extend the authority of this court

The jurisdiction of our courts of equity, in matters of dower, for the purpose of affishing the widow with a discovery of the lands or title deeds, or of removing impediments to her rendering her legal title available at law, has never been doubted. But it has been questioned, whether equity could give relief in those cases, in which there appeared to be no obstacle to her legal remedy? Wallis v. Everard, 3 Ch. Rep. 87. By the civil law widows were intitled in the first instance to fue in the council of the emperor, Cod. Lib. 3. Tit. 14. And it feems now, to be fettled, that " The labours under so many disadvantages at law, from " the embarrassments of trust, terms, &c. that she is " fully entitled to every affistance that a court of equity " can give her, not only in paving the way for her to " establish her right at law, but also by giving com-" plete relief when the right is afcertained." Curtis v. Curtis, 2 Brown's Ch. Rep. 634. Lucas v. Calcraft, there cited; and Munday v. Munday, 4 Bro. 1. 294. 2 Vez. Jun. 122. And in the exercise of this jurisdiction, courts of equity will even enforce a discovery against a purchaser for valuable consideration without notice. Williams v. Lambe, 3 Bro. Ch. Rep. p. 264. And though the widow should die before she had established her right to dower, equity will, in favour of her perfonal reprefentatives, decree an account of the rents and profits of the lands, of which she afterwards appeared dowable; but will not allow interest thereon, Lindsey v. Gibbon, 1783. cited 3 Bro. Ch. R. 493. Wakefield v. Childs, 8th July, 1791, MSS.

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court further than the practice of former times (k).

With respect to the exclusive jurisdiction exercised by our courts of equity, in matters of trust, and in those cases where the principles of substantial justice entitle the party to relief, but the positive law is silent, it seems impossible to define with exactness its boundaries, or to enumerate with precision its various principles. In the course of this treatise, however, a variety of instances will appear, from which it is hoped the wisdom of this branch of equitable jurisdiction will be fully and satisfactorily established, and to which at prefent it may be sufficient to refer.

(g) This proposition is neither fanctioned by principle nor authority; for though it may be true that equity has, in many cases, decided differently from courts of law, yet it will be found, upon reference to fuch cases, that they involved circumstances to which a court of law could not advert, but which, in point of fubstantial justice, were deserving of particular confideration, and which a court of equity, proceeding on the principles of substantial justice, felt itself bound to respect. The opinion, however, stated by our author, has certainly prevailed; and Sir Joseph Jekyll, in Cowper v. Cowper, 2 P. Wms. 753. feems to have been particularly anxious to do it away. "Though (fays he) " proceedings in equity are faid to be fecundum difcre-" tionem boni viri; yet, when it is asked, vir bonus est " quis? the answer is, qui consulta patrum, qui leges " juraque servat. As it is said in Rooke's case, 5 " Rep. 99. b. that discretion is a science, not to act " arbitrarily according to men's will and private affection: fo the difcretion which is to be executed here,

" is to be governed by the rules of law and equity. " which are not to oppose, but each in its turn to be " fubservient to the other. This discretion, in some " cases, follows the law implicitly; in others, assists " and advances the remedy; in others, again, it re-" lieves against the abuse, or allays the rigour of it: " but in no case does it contradict or overturn the " grounds and principles thereof, as has been fome-" times ignorantly imputed to this court. That is a " discretionary power, which neither this nor any other " court, not even the highest, acting in a judicial capacity, is by the constitution entrusted with." It will not, I trust, be construed a want of respect to the authority of Sir Joseph Jekyll, to attempt to give additional force to his fentiments, by referring to the concurrence of Sir Thomas Clarke, who, concluding his opinion in Burgess v. Wheate, 1 Blackst. Rep. 123. with the above passage, adds, "This description " is full and judicious, and what ought to be imprinted " on the mind of every judge,"

(b) It is the duty of every court of justice, whether a court of law or of equity, to consult the intention of the legislature; 10 Rep. 57. b. nor does it any where appear, that, in the discharge of this duty, courts of equity are invested with a larger or more liberal discretion than courts of law. "Yet, though a court of equity will not differ from the courts of law, in the exposition of statutes, yet does it often vary in the remedies given, and in the manner of applying them." Per Lord Talbot, Bosanquet v. Dashwood, Forrester, 39, 40. Thus, if plaintiff in equity pray that an instrument or security given for an usurious consideration, be delivered up to be cancelled, the only terms upon which equity will interpose, are, the plaintiff paying to the defendant

defendant what is really and bona fide due to him: and if plaintiff do not make fuch offer by his bill, defendant may demur, Mason v. Gardner, 1 Nov. 1793. MS. whereas, if the party, claiming under fuch instrument, come into equity to render his claim available, the court will proceed upon the letter of the statute; for though the court, in many cases, have a discretion whether it will interfere or not, and may therefore prescribe the terms of its interference; yet it will never exercise that discretion in favour of a plaintiff, who is a wrong doer, feeking to render a court of equity the mean of effectuating the wrong. It may also be material to observe, that equity will not allow a statute, made for the prevention of fraud, to be converted into the instrument of fraud. 2 Roll's Ab. 378. And therefore, though the statute of frauds enacts, that no action shall be brought on contracts or agreements relating to lands, unless the same be reduced into writing; yet, under certain circumstances, which will hereafter be particularly noticed, [fee B. 1. c. 3. f. 8.] equity will relieve on fuch contract or agreement. So, on the construction of the register act, 7 Anne, c. 20. though it is thereby enacted, that a register deed shall take place of an unregistered, deed, whence it might be argued, that if a person knew of the unregistered deed before he purchased, it should not stand against him; yet equity says, if the party knew of the unregistered deed, his registered deed shall not set it aside, because he has that notice which the act of parliament intended he should have. Blades v. Blades, 1 Eq. Ca. Ab. 358. pl. 12. Hine v. Dodd, 2 Atk. 275. Le Neve v. Le Neve, 3 Atk. 646. Ambl. 436. Doe on demife of Watson v. Routledge, Cowp. 712.

(i) Sir

- (i) Sir William Blackstone, addressing himself to the opinion of Lord Coke, that acts of parliament contrary to reason are void, observes, that, " if the " parliament will positively enact a thing to be done " which is unreasonable, he knows of no power " that can control it." I Com. Intr. s. 3. The reason which he assigns, namely, that "it would set the judi- " cial power above that of the legislature," is certainly entitled to great weight; yet it will be difficult to reconcile this opinion with the proposition which he lays down in the second section of his introduction, that " no human laws are of any validity, if contrary to " the law of nature;" which he describes as " coeval " with mankind, and dictated by God himself."
- (k) "Principles of decision adopted by courts of equity, when fully established, and made the grounds of fuccessive decisions, are considered by those courts as rules to be observed with as much strictness as positive law." Mitsord's Treatise, p. 4. And it will be found, that, even in cases of fraud, which from their nature must be almost infinitely various in their circumstances, courts of equity constantly proceed upon some clear and established principle, sufficiently comprehensive to meet the circumstances of the particular case to which it is applied, and not upon a vague, arbitrary, and indefinite power, which, in its exercise, might indeed prove mischievious to the individual, and alarming to the state.

SECTION IV.

NOW the subject matter, both of law and equity, is contracts, as we have before observed; and a pact or covenant, in the general sense of it, comprehends all things about which men agree, in their transactions, negotiations, and intercourse with one another. Yet it is not here to be extended fo largely, as to take in every agreement of opinion; but fuch only as induce an obligation, or contain a conveyance of some right (1). Neither do we at present intend to treat of those universal pacts, by which the propriety and dominion of things was at first established; but those particular contracts, which are limited to the benefit of certain persons, and presuppose property and price (m); these (faith the Prætor), as the mouth and oracle of the law, and building his opinion on the fure foundation of natural justice and equity, if they are not gained by ill practice, nor made against the laws, I will fee kept (1); for what can be so agreeable (1) Dig. lib. 2. to human faith, as the observance of those things which they themselves have appro-

ved of, and made a law amongst one another? In contracts, therefore, respect is first to be had to the things expressed in the agreement, if they may possibly be obtained; and for default of the things themselves, a sufficient equivalent is to be given (n).

- (1) Such contracts or agreements as do not induce an obligation, are confidered as nuda pacta, as well by the common as by the civil law, and therefore cannot be made the subject of a demand in law or equity; "ex nudo pacto non oritur actio." 2 Blackst. Com. 445. 16 Vin. Ab. 16. See c. 5. s. 1. note.
- (m) Our author borrows this distinction between packs and contracts from Puffendorff, b. 5. c. 2. s. 1. See also Heineccius, Elem. Jur. Nat. and Gent. c. 14. s. 385. See a further distinction between obligations to give a certain thing and to do a particular act, pointed out and observed upon by Pothier Traité des obligations, partie 2. c. 1. s. 3.
- (n) The common and statute law act upon this principle to a certain extent. Thus, in the case of replevin, if the defendant prevail, the goods distrained are to be restored by writ de retorno habendo; in ejectment, if plaintiff establish his title, he shall have the possession of the land by writ of habere facias possessionem: so, in a writ of covenant, brought by the lessee against the lessor, if the term be not expired, he shall recover the term again, if the lessor has put him out. Fitz. N. B. 325. Or if there be a covenant to convey or dispose of lands, the covenantee may have a special writ of covenant for a specific performance of the contract. 3 Blackst.

Blackst. Com. 165. So by the action of detinue, the judgment is, that the plaintiff recover the specific thing detained: so in action of waste, the plaintiff shall recover the land wasted.

These instances, though sufficient to shew that courts of law recognize the principle upon which courts of equity decree the specific performance of agreements, do not by any means comprehend that almost infinite variety of cases to which the principle is applicable; and to supply that defect, the interference of a court of equity becomes necessary, governed, however, by a variety of considerations.

SECTION V.

BUT the law of England was very defective in this particular, and fell short of natural justice, where an actual conveyance was not obtained; which oftentimes, from the distance of the place where a local ceremony was required, or from other circumstances wanting, was not immediately practicable; for executory agreements were there looked upon but as a personal security, and damages only to be recovered for the breach of them; most commonly either by an action of covenant, if there was a deed, or by an assumption of the coverant, if without deed. But it proving

ving a great hardship, in particular cases, to be left only to the uncertain reparation by damages, which the personal estate perhaps may not be able to satisfy, courts of equity, therefore, where there was a sufficient consideration, did, in aid of the municipal law, compel a specific performance (o). And there are many other cases wherein

(0) The jurisdiction exercised by courts of equity, in decreeing the specific performance of agreements, is certainly of a very ancient date, it being referred to in the Year-book of 8 E. 4. 4. b. as well known and established; yet it has been sometimes complained of, and attempted to be restrained, as an encroachment on the jurisdiction of courts of law, particularly in the case of Bromage v. Jenning, Roll's Rep. pl. 21. 4 Vin. Ab. 399. pl. 1. It is now, however, by a feries of decisions, established, that courts of equity may decree a contract to be performed in specie, at least wherever a court of law would give damages for the non-performance of it, but which damages would not be an adequate compensation for the non-performance, the party wanting the thing in specie. B. 1. c. 3. f. 1. But an agreement to be decreed in specie must be fair and reasonable. Phillips v. Duke of Bucks, 1 Vern. 227. Bromley v. Jefferies, Vern. 415. Green v. Wood, 2 Vern. 632. Young v. Clarke, Pre. Ch. 538. Francis Max. p. 6. note.

As I shall have occasion to consider this subject more particularly in another part of this treatise, B. 1. c. 3.

wherein equity will give relief, although there be a remedy at law, if that be infufficient; as for a nuisance by injunction, or the like (p), yet their decree binds the person

c. 3. f. 1. It may be fufficient, in this place, to refer to the case of Dodsley v. Kinnersley, Ambler's Rep. 406. where Lord Hardwicke stated, that, before Lord Somer's time, the practice, as to agreements, was to fend the party to law; and if he recovered any thing by way of damages, the court then entertained the fuit; which practice appears, notwithstanding the observation of Lord Macclesfield in Cannel v. Buckle, 2 P.Wms. 243. to confirm the opinion of the court in the case of Dr. Bettefworth v. Dean and Chapter of St. Paul's, Sel. Ca. in Ch. 66. That equity will not entertain the fuit, unless the plaintiff wants the thing in specie, is expressly recognized as the rule of the court by the Master of the Rolls (Lord Kenyon) in Errington v. Annesley, 2 Brown's Rep. 343. and had been proceeded upon in several earlier cases. Cud v. Rutter, 1 P. Wms. 570. Cappur v. Harris, Bunb. 135. Dorifon v. Westbrook, 2 Eq. Ca. Ab. 161. pl. 8. 5 Vin. Ab. 540. pl. 22. Pufey v. Pufey, 1 Vern. 273. D. of Somerset v. Cookson, 3 P. Wms. 389. Fells v. Read, 3 Vez. Jun. 70. But see Gardner v. Pullen, 2 Vern. 394. in which case the court seems to have departed from it, by decreeing performance of an agreement for India flock.

(p) In cases of nuisance courts of equity interpose, (see Coulson v. White, 3 Atk. 21.) to prevent and referain an injury, for which courts of law, in many cases, could

person only, and not the estate (q); because the Chancery is, in this respect, no court

could not give an adequate compensation, yet, still regarding the claims of the defendant, they will not interfere before answer, unless the plaintiff state a prescriptive right, or an agreement, and support the same by affidavit. Morris v. Lessees of Lord Berkeley, 2 Vez. 452. Attorney General, at the relation of Gray's-Inn Society, v. Doughty, 2 Vez. 453. See Lord Bathurst v. Burden, 2 Brown's Rep. 64. and the cases there cited. But every common trespass is not a foundation for an injunction, where it is only contingent and temporary. Coulson v. White, 3 Atk. 21.

But courts of equity, for the purpole of preventing injury, will not only interfere in cases of nuisance, but also in cases of waste: for though the statute of Glocester, 6 Edw. 1. c. 13. has, under certain circumstances, provided the writ of estrepement, in order to prevent the committing of waste, pendente lite; yet it has been found, that this preventive is applicable to very sew cases; so that the most usual way of preventing it now is by bill in equity; see Mitsord's Treatise, 123, 124. 3 Bla. Com. 225, 226, 227, by which not only suture waste may be restrained, but the timber already selled may be secured for the benefit of the party intitled to it, by restraining the party guilty of the waste from removing it.

But in the exercise of this branch of their jurisdiction, courts of equity are particularly cautious, lest their interference should work an injury; and therefore they will not, in any case, restrain the desendant, before court of record (1); though some think (1) 4 Inst. 844 this opinion absurd; for both ought equally

before the time for his answering be expired, unless the plaintiff by an affidavit state the particulars of his title. Whiteleg v. Whiteleg, 1 Brown's Rep. 57. and also of the truth of the feveral facts alledged in his bill. 2 Harrison's Ch. 237. Nor will they, even upon fuch affidavit, restrain the defendant from working a mine already opened, unless it appear that the defendant has only a term in the estate for years or for life, and that the reversion be in the plaintiff. Sir James Lowther v. Stamper, 3 Atk. 496. Or that it be a breach of an express covenant, or an uncontroverted mischief. Anon. Ambler, 209. Upon a similar principle, courts of equity will restrain the printing and felling almanacks, bibles, and other works, at the fuit of the owners and authors of fuch books; or the use of an alledged new invention, at the fuit of the patentee. Mitford's Treatife, 124, 129. Anon. 1 Vez. 476. Bolton v. Bull, 3 Vez. Jun. 140. But it has been held, in some cases, that the plaintiff's exclusive right must be admitted by the defendant, or established at law, in order to warrant the interference of the court. Anon. 1 Vern. 120. Hills v. University of Oxford, 1 Vern. 275. East India Company v. Sandys, 1 Vern. Jefferys v. Baldwin, Ambler's Rep. 164. Bateman v. Johnson, Fitz-Gib. Rep. 106. Horne v. Baker, 9th May, 1710. Blanchard v. Hill, 2 Atk. 485. The principle upon which these cases appear to have proceeded is, that the injunction might operate irreparable damage to the defendant, in the event of the plaintiff's not being exclusively intitled; whereas the damage VOL. I. fustained equally to be bound by the decisions of this court, or else there would be an impotence in the court, that would restrain it from doing justice.

fustained by the plaintiff, in the event of his establishing his title, allowed of compensation.

(q) Where the subject in dispute is not within the jurisdiction of the court, it is certainly true that the decree of the court operates merely in personam; but if the lands be within the jurisdiction of the court, and the desendant resuse to perform the decree, as to give the plaintist possession, the court will enforce its decree by the writ of assistance, which is for such purpose directed to the sherist. Penn v. Lord Baltimore, 1Vez. 454. Stribley v. Hawkie, 3 Atk. 275. Roberdeau v. Rous, 1 Atk. 543. Foster v. Vassal, 3 Atk. 587. This process, however, seems to have been first issued in the time of James the First. Penn v. Lord Baltimore.

SECTION VI.

HOWEVER the common lawyers continually poured out their complaints against this incroachment, as they imagined, on their own profession; yet pretended all the while, that their only concern was,

lest this new jurisdiction should shake the foundation of the ancient municipal laws of this realm. The law, say they, has appointed certain ceremonies, in the transferring of property, for the quiet and repose of society. It has also provided certain technical words, of peculiar and determined significations, for the limiting of the duration of men's estate; and it is better to slick to the known rules of law than to sollow the fancies of private men (r). But if the assurance is bad, and yet there

(r) It feems to have been formerly the practice of the chancellor to confult the judges, whether the case before him was fuch as called for the interpolition of a court of equity, 2 Roll's Rep. 424. At what period, or for what reason this practice was discontinued, the books no where mention: it was probably, however, upon the discontinuance of this practice, that courts of law became jealous of the increasing powers of courts of equity, and endeavoured to restrain them; and though no instance is to be found of prohibitions being granted, to restrain proceedings in the court of Chancery, yet there are many instances of inferior courts of equity being fo restrained, particularly where the suit was for a specific performance; for, said the court of King's Bench, "fuch relief in equity would wholly " fubvert the actions of case and covenant, and compel " a leafe, though the party contracting was entitled to " make his election, when he would grant the leafe,

there is a remedy, to what purpose is the common law? But equity was not fatisfied with this false and shallow reasoning of the common lawyers. For it never pretended to any arbitrary fway over the stated rules of law, but only a power of conducting and guiding them according to honesty and good conscience; and what possible inconvenience can there arise, when there is a good consideration, and the intention is clear, that men should be compelled to perform their engagements, and that all the means, without which that cannot be obtained at law. should be supplied by a court of equity (1)?

"or pay the damages sustained by the other party." Bromege v. Jenning, 1 Roll's Rep. 368. Hudson v. Middleton, 2 Roll's Rep. 433. The fallacy of this reasoning is obvious: it assumes, that the party contracting has an election to perform his contract or not; whereas, in conscience, he is clearly bound to do the specific thing which he has covenanted to do, but which obligation a court of law cannot in all cases enforce. See B. 1. c. 3. s. 2.

(5) The imperfect execution of the contract not affecting the equity which is raised by the agreement, see 3 Bla. Com. 432, 433, where this point is fully considered.

SECTION VII.

FQUITY, therefore, will supply any defects of circumstances in conveyances (t); as of livery (1), feifin (2) in (1) Francis's the passing of a freehold (u), or of the sur- Bokenham render (v) of a copyhold (3), or the like. Also all misprissions in deeds, as of the Thompson

Maxims, 55. v. Bokenham, 1 Ch. Ca. 240. v. Atfield, 2 Ch. Rep.

(2) Man v. Cobb. Ch. Ca. 269. Jackson v. Jackson, Select Ca. Ch. 81. (3) Smith v. Smith, 1 Ch. Rep. 57. Bradley v. Bradley, 2 Vern. 163. Jenning v. Moore, 2 Vern. 609. Anon. 2 Freeman, 65. Taylor v. Wheeler, 2 Vern. 564.

- (t) This remedial power of courts of equity does not extend to the supplying of any circumstance, for the want of which the legislature hath declared the inftru-See Hibbert v. Rolleston, 3 Bro. ment to be void. Ch. Rep. 571. Williams v. D. of Bolton, 2 Vez Jun. 128.
- (u) And where a defective conveyance is aided, it is faid that the estate shall be discharged of mesne incumbrances by the party, as if a mortgagee wants livery, and thereupon the heir confesses judgments to another, the mortgagee shall hold the land discharged from the judgments. Burgh v. Burgh, Finch's Rep. 28. So where the land is bound by articles made for a valuable confideration, and the money paid. Finch v. E. of Winchelfea, I P. Wms. 279. but, quere whether in these cases the subsequent incumbrancer had not notice of the former; the general rule being that a court of equity will not interpose in prejudice of a defendant having a legal interest for a valuable consideration, and without notice of the plaintiff's equity.

(v) There

(4) 2 Co. myn's Dig. 126. Downes v. Moreton, 2 Ch. Ca. 68. Simms v. Urry, 2 Ch. Ca. 225. (5) Scott v. Wray, 1 Rep. Ch. 45. (6) Edwin

names of the parties (4), or the sum in a bond (w). And an award (5), or charter-party (6), though void or defective at law, may find relief here. Nor shall any siction of the common law, as the extinguishment of a covenant by marriage, prevent

v. the East Ind. Comp. 2 Vern. 210. but see Hotham v. East Ind. Comp. Dougl. 264.

(u) There is no doubt but that courts of equity will fupply the furrender of a copyhold. It is faid, however, to be now fettled, that unless there be a valuable confideration, they will interpofe, for fuch purpofe, in favour of three descriptions of persons only; creditors, wife, and children; and even, in fuch cases, they proceed subject to several restrictions. For though they will fupply the furrender of copyholds in favour of creditors, if the other estates liable to the payment of debts are not sufficient, Drake v. Robinson, 1. P. Wms. 444; Bixby v. Eley, 2 Bro. C. R. 325; yet, if there be both freehold and copyhold estates devised for the payment of debts, and the freehold be sufficient for fuch purpole, they will not fupply the furrender of the copyhold. Hall v. Beane, I Vez. 215. Rafter v. Stock, I Eq. Ca. Ab. 123, 124. Hillier v. Tarrent, Exch. Trin. T. 1791. In supplying a surrender in favour of a wife, or younger children, (who must be legitimate. Furfaker v. Robinson, Pre. Ch. 475.) courts of equity respect the claims of the heir at law, and therefore will not interpose, if the heir would thereby be left unprovided for. Kettle v. Townshend, 1. Salk. 187. Hawkins v. Leigh, I Atk. 387. b. 2. c. 2. f. 2. note (p.) But the heir, whose claim is

prevent the interpolition of this court (7): for equity regards not the outward form, but the inward substance and essence of the matter (8), which is the agreement of the parties upon a good and valuable confideration (x), and where the persons interested

(7) Cannel v. Buckle, 2 P. Wms. 243. Acton v. Pearce, 2 Vern. 480. See ch. 2. fect. 6. note (e). (8) Francis's Maxims, Max. 13.

to be thus respected, must be one for whom the testator was under as firong a moral obligation to provide as for the devisee. Chapman v. Gibson, Rolls, 3 Bro. Ch. Rep. 229. And must be wholly unprovided for. Pike v. White, 3 Bro. Ch. Rep. 286. See also Lindopp v. Eborell, 3 Bro. Ch. Rep. 188. And if the fupplying of the furrender would not difinherit fuch heir, courts of equity will supply it in favour of the wife, though she be otherwise provided for. Smith v. Baker, 1 Atk. 386. But it was held, in Ross v. Ross, 1 Eq. Ca. Ab. 124. that they ought not to supply a furrender for younger children against an elder, to make them in a better fituation than the elder. This confideration, however, was not attended to in Cook v. Arnham, 3 P. Wms. 283. Forrester, 35.; both the Master of the Rolls and Lord Talbot being of opinion, that the father was the best judge what was a proper provision for his children.

In those cases in which the court will supply a surrender, it is to be understood, that the effect of the furrender is bounded by the motive which induces the court to fupply it; therefore, where the testator devised a copyhold to trustees in trust, to sell, and to pay the interest of the produce to the wife during her life, and after her death

interested fully intend to contract a perfect obligation, though by mistake or accident, they omit the set form of law. So that no remedy is to be had to compel a performance of it in courts of civil judicature, yet are they bound, in natural justice, to stand to their own agreement.

death to a stranger, the court, though it supplied the surrender in favour of the wife, decreed that the customary heir should be at liberty to apply after her death. Marston v. Gowan, 3 Bro. Ch. Rep. 170. Courts of equity will, in fupplying the furrender of a copyhold estate in favour of a purchaser for valuable consideration, go still farther; for they will not only supply it against the party himself, and his heir, Barker v. Hill, 2 Ch. Rep. 113. but will also supply it against his affignees and creditors, if he become a bankrupt. Taylor v. Wheeler, 2 Vern. 565. I have not noticed the case of copyholds devised to charitable uses, the want of furrender in fuch cases having been prior to 9 G. 2. c. 36. made good not by the discretion of the court, but by the strong and general words of 43 Eliz. Attorney-General v. Burdett, 2 Vern. 755. Duke's Charitable Uses, 84. Attorney-General v. Andrews. 1 Vez. 225. Nor have I noticed those cases in which a furrender is directed by the will. Wardell v. Wardell, 3 Bro. Ch. Rep. 116. confidering them rather in the nature of trusts to be executed than defective conveyances.

Equity will also supply any defect in the execution of a power, provided the same be for a good or valuable consideration; but equity will not supply the non-execution

execution of a power. See B. 1. c. 4. f. 25.; fee also Powell on Powers.

- (w) Quere, whether equity will supply a defect in a bond against a mere surety? Crosby v. Middleton, 3 Rep. Ch. 55. Sheffield v. Lord Castleton, 2 Vern. 393.
- (x) Though equity will relieve by supplying the defects of a conveyance upon a good or valuable confideration, yet it will not interfere if the conveyance be purely voluntary. Pickering v. Keeling, 1 Ch. Rep. 78. Bonham v. Newcombe, 2 Ventris, 365. Lee v. Sir Robert Henley, 1 Vern. 37. Coleman v. Sarell. 1 Vez. Jun. 50.

SECTION VIII.

A ND any covenant, though not specific, but only a general covenant for indemnity, may be decreed here: for equity prevents mischief (y); and it is unrea-

(x) The prevention of mischief, which should be one of the principal objects of every system of jurisprudence, constitutes a very important branch of equitable jurisdiction. With a view to this object courts of equity entertain suits quia timet. Baker v. Shelbury, 1 Ch. Ca. 70. to prevent waste (as already noticed), to perpetuate

(1) Ranelagh v. Hayes, 1 Vern. 189. Hungerford v. Hungerford, Gilb. Rep. 69. Hayes v. Hayes, 1 Ch. Ca. 223. Ayloff v. unreasonable that a man should have a demand continually hanging over him (1). Yet it seems, where the incumbrance is not necessary, but contingent, you should recover no damages at law till a breach, and therefore they ought not to decree it in equity. So, although the Chancery cannot assess damages (z), yet a cove-

nant

Fanshaw, 1 Ch. Ca. 300. Maxims in Equity, Maxim 8.

perpetuate testimony, D. of Dorset v. Serj. Girdler, Pr. Ch. 531. 1. Vern. 308. Mayor of York v. Pilkington, 1 Atk. 282. Brandly v. Ord, 1 Atk. 571. to fecure, and before answer the property of a deceased debtor from being misapplied by his executor. lor v. Allen, 2 Atk. 212. Cuthell v. Smith, 12 Feb. 1793. But fuch fuit must be against the executor, and not against the debtors, &c. of the deceased, unless the executor and debtors collude. Elmslie v. Macauley, 3 Bro. Ch. Rep. 624. Utterson v. Mair, 2 Vez. Jun. 95. Upon the same principle courts of equity will decree the delivering up of deeds or fecurities of money, upon which the defendant might against conscience recover at law. (See Ryan v. Macmeth, 3 Bro. Ch. Rep. 15. where the distinction is stated upon this point), or will immediately, upon bill filed, and an affidavit of facts, restrain the defendant from negociating a bill of exchange or promissory note, it it appears that thelegal or equitable defence of the plaintiff against the defendant's demand would be defeated by the negociation. Smith v. Haytwell, Amb. 66. Patrick v. Harrifon, 3 Bro. Ch. Rep. 476. So also to restrain the husband

nant by the husband, that the jointure should be and continue of such a value, may be carried into execution in this court; for the Master may inquire into

band from affigning the property of the wife in order to defeat her equity to a fettlement out of fuch property. Ellis v. Ellis, 6 July, 1793. Ch. Anon. 9 Mod. 43.

Bills quia timet proceed on this principle. Baker v. Shelbury, 1 Ch. Ca. 70. So also do bills, (as before stated) to prevent waste, to perpetuate testimony, to restrain the defendant's negotiating bills of exchange, or promissory notes, obtained by fraud; in which last case, as in plain cases of waste, &c. courts of equity will, on motion, grant an injunction immediately on the bill being filed, lest the desendant should, upon intimation of the suit, by negotiating the security, deseat its object; in such case, however, plaintiss must support his motion with an affidavit of the truth of the facts stated in his bill. Patrick v. Harrison, Ch. 2d March 1792. MSS. &c.

(z) In Denton v. Stewart, 4th July 1786, MSS. Lord Kenyon, Master of the Rolls, sitting for the Chancellor, directed the Master to inquire what damage the plaintist had sustained by the defendant's not performing his agreement, of which a specific performance was prayed by the bill, but which could not be decreed, the defendant having, by sale of the estate, put it out of his power to perform his agreement with the plaintist. See also decree in Cudd v. Rutter, 1 P. Wms. 572. as taken by Mr. Cox from the Register's Book.

(2) Hodges v. Everard. M. 1699. 1 Eq. Ca. Ab. 18. pl. 7. See Stafford v. Mayor of London, 6. Vin. Ab. 472. pl. 10.

(3) See ch. 2. f. 6. note (f).

it, or they may fend it to be tried at law in a quantum damnificatus (2). So a bill for a specific performance of an agreement by the husband with a third person, for a separate maintenance to the wife, is proper here, notwithstanding that alimony belongs to the spiritual court (3). And, regularly, there are but four cases, wherein an agreement will not be binding in equity: 1st, For want of affent: 2dly, For want of testimony of the affent: 3dly, Where there is fome vice or defect in the subject matter: or, 4thly, The want of a sufficient consideration.

CHAP.

CHAP. II.

Of Assent to Agreements.

SECTION I.

WE are first, then, to examine what confent is required to the making pacts and agreements valid; for the rule of the civil law is highly agreeable with natural justice (a), that, in the translation of property, there must be an union of minds and affections. For, whether it be a fale, or a loan, or a free gift, or any other fort of contract, unless there be a mutual agreement, it can never have a full Now confent is an act of reason accompanied with deliberation (1); the mind weighing, as in a balance, the good and evil on either fide. So that creatures, void of reason and understanding, are incapable of giving a ferious and firm affent; and thus idiots, madmen, and in-

(1) Grotius de Jure Belli et Pacis, lib. 2. c. 11. f. 5.

⁽a) Every true confent supposes, 1st, a physical power; 2dly, a moral power of consenting; 3dly, a serious and free use of them. Puffendorff's Law of Nature and Nations, Barbeyrac's Note 1. b. iii. c. 6. s. fants,

fants, were restrained by the Roman law from all manner of engagements and contracts, because they were supposed to be unable to judge of their own actions (b); and therefore the charge and care of them was committed to others (c). But the common lawyers endeavoured to fet up a maxim of their own, in defiance of natural justice, and the universal practice of all the civilized nations in the world: for, they faid, it was a known rule in their law, that no man of full age should be admitted in any plea to stultify and disable himself (2), because, when he recovers his memory, he cannot know what he did when

(2) 39 H. 6. 42. Co. Lit. 247. a. 4 Co. 124. Beverley's cafe. Stroud v. Marshall, Cro. Eliz. 398. F. N. B. 202.

- (b) Euriosus nullum negotium gerere potest quia non intelligit quod agit. Infans et qui infantiæ proximus est non multum a surioso distant. Inst. lib. 3. tit. 20. s. De Inutilibus Stipulationibus.
- (c) The law of England, whilst it anxiously protects the interest of those whom the infirmities of disease, or imbecility of age, render incapable of protecting themselves, respects the right which every individual of a free constitution claims, and which, indeed, the very nature of a free constitution seems to require, that of disposing of his property as he thinks sit, provided he in so doing consults the rights and claims

when he was of non fane memory (d); and therefore they concluded, he should have no relief for this, even in a court of equity,

of others. The only restriction prescribed by the law of England in fuch case, being "fic utere tuo ut ali-"enum non lædas." The civil law, however, extended its views and protection to perfons, whose prodigality might not only prejudice their own interests, but those of their offspring; and we find the authority of the Prætor frequently interposed to restrain the extravagance of the individual. "Solent Prætores fi " talem hominem invenerint, qui neque tempus, neque "finem expensarum habet, sed bona sua dilacerando " et dissipando profundit curatorem ei dare exemplo " furiofi, et tamdiu erunt ambo in curatione, quamdiu " vel furiofus fanitatem, vel ille bonos mores receperit." Ff. 27. 10. 1. Furiofi vel ejus cui bonis interdictum sit nulla voluntas est. Digest. lib. 50. tit. 17. reg. 40.

(d) If the event of the plea had been determinable by the testimony of the party pleading it, there might have been some colour for the objection to it; but, as the desendant must have substantiated the truth of his plea by evidence aliunde, it seems unaccountable how such a notion could have acquired the force of a rule of law. Sir William Blackstone has endeavoured to trace its progress; and observing that the plea, dum non fuit compos mentis sue, was allowed in the time of Edward the First, he refers the origin of this opinion to the reign of Edward the Third; from which period, it must be admitted to have been acted upon as a fettled and

equity, because it would be in subversion of a principle and ground in law (e). Yet fome have thought, that, by the ancient common

and established rule of law, "though" (the same author remarks that) "later opinions, feeling the inconvenience " of this rule, have, in many points, endeavoured to " restrain it." 2 Com. 291, 292. I have, however, found only one printed case, in which the rigour of this rule feems to have been relaxed at law, which was an action of debt upon articles. Defendant pleaded non est factum; and, upon the trial, defendant offered to give lunacy in evidence. The Chief Justice first thought it ought not to be admitted, upon the rule that a man shall not stultify himself; but, on the authority of Smith v. Carr, 5th July 1728, where Chief Baron Pengelly in the like case admitted it, and on confidering the case of Thompson v. Leach, in 2 Ventr. 198, the Chief Juffice suffered it to be given in evidence, and the plaintiff, upon the evidence, was nonfuited. Yates v. Boen, Str. 1104.

(e) Though the principles upon which courts of equity in general relieve, appear to intitle the lunatic to relief, I have not found a fingle case, in which the plea of non compos by the lunatic himself, before inquifition, has been allowed; on the contrary, in Bonner v. Thwaits, Tothill, 130, it is faid, that Chancery will not retain a bill to examine the point of lunacy. After the lunatic is fo found by inquisition, his committee, indeed, may avoid his acts from the time he is found to have been non compos; as in Clerk by Committee v. Richard Clerk, et al. 2 Vern. 412. Addison by Committee v. Dawson, et al. 2 Vern. 678. Ridler

common law, he might have the writ dum non fuit compos mentis, and of confequence might enter (3). And it is undoubtedly not for want of right to the thing, but of capacity to do the act, that a madman is hindered to avoid his own grant; for where the conveyance does not pass by livery of his hand, the conveyance is absolutely void (g); and therefore

(3) Fitz. Nat. Brev. 449. 6th edition (f).

Ridler by Committee v. Ridler, 1 Eq. Ca. Ab. 279. It may, however, be proper to observe, that courts of equity were formerly so anxious to adhere to the rule of law, that the lunatic was not allowed to be a party to a suit to be relieved against an act done during his lunacy; Smith's Case, 1 Ch. Ca. 112; but see Ridler v. Ridler, 1 Eq. Ca. Ab. 279; though he might be party to a suit to enforce performance of an agreement entered into prior to his lunacy. Woolrich's Case, 1 Ch. Ca. 153.

- (f) Though the authority of Fitzherbert upon this point is expressly over-ruled in Stroud v. Marshal, Cro. Eliz. 398; yet it seems supported by the reasoning and cases upon which it relies.
- (g) Lord Coke, therefore, was of opinion, that an idiot could not avoid a feoffment by plea of idiocy. Co. Litt. 274. a. Quere, Whether such plea would not now be allowed, it having prevailed against a bond, Yates v. Boen, Stra. 1104.

(4) 4 Co.
1384.
Thompson
v. Leach,
g Mod. Rep.
301.
Carth. 435.
1 Salk. 427.
3 Lev. 284.
2 Ventris,
198.
Show. Parl.
Ca. 150.

fore a furrender by deed of a tenant for life, being con compos, will not bar a contingent remainder (4). But now only privies in blood, viz. the general or special heir inheritable, may shew the disability of the ancestor (b), and privies, in representation as executors (i) or administrators, the infirmities of the testor; and neither

- (h) As the heir may avoid the alienations of his ancestor being non compos by entry; by writ dum non suit compos mentis; and by plea, Co. Litt. 247. Quere, Whether equity would not interpose on behalf of a devisee, claiming under a will made by the testator when compos, against a grantee, claiming under a conveyance executed after the testator was found non compos?
- (i) An idiot can have no executor, for being non compos a nativitate, he could at no time make a will; but a lunatic may have an executor, for lunacy is not a revocation of a will made when compos. Forse and Hembling's Case, 4 Co. 91. b. And the Court of Chancery, will in order to secure the will, direct it to be brought into court. Ex parte Hinks, 3 Nov. 1792, MS. But equity will not entertain a suit, to perpetuate the testimony of witnesses to such will, in the lifetime of the lunatic. Sackville v. Aylworth, 1 Vern. 105. Nor to perpetuate testimony of any other sact, in which the next of kin as such may be interested, for they may not be next of kin at the time of the lunatic's death, or he may recover. In supporting the validity of the will, notwith-

neither privies in estate, nor privies in tenure (5), for the difference is between a (5) 4 Co. 124. title of entry, as by reason of a condition, and a right of entry (6), as in the cases before-mentioned; and the fame diversity holds in case of infancy and coverture.

(6) Whittingham's cafe, 8 Co. 42. b.

notwithstanding the subsequent lunacy, the rule of the common law is conformable to the civil law, which provides, that " neque testamentum recte factum, neque " ullum aliud negotium recte gestum, postea furor in-" terveniens perimit." Inft. lib. 2. tit. 12. f. 1. And courts of equity will not only fustain contracts completed by the lunatic whilst fane; but, under certain circumstances, will enforce performance of such as were entered into before, but were not complete at the time of the lunacy; " for the change of the condition of a " person entering into an agreement, by becoming " lunatic, will not alter the rights of the parties, which will be the fame as before, provided they can " come at the remedy; as, if the legal estate be vested " in trustees, a court of equity ought to decree a " performance; but, if the legal estate be vested " in the lunatic himself, that may prevent the remedy " in equity, and leave it at law." Owen v. Davis, I Vez. 82. As to the effect of a defendant's becoming infane, after an arrest at law, it seems to be now settled, that fuch circumstance is not a reason for discharging him out of custody, on filing common bail. Kernot v. Norman, 2 Term Rep. 390. Nor will a court of law interpose, though the party be infane at the time of the arrest. Mott v. Verney, 4 Term Rep. 121. Nor will the court discharge the bail on the ground of the defendant's having fince become a lunatic. Ibbetson v. Lord Galway, 6 Term Rep. 133.

SECTION II.

HOWEVER, the acts of a non compos or idiot, unless of record (k), for the inconvenience of overturning a record by a nude averment, were avoidable by law, even during his lifetime, in a scire facias by the king (1), who is bound by his royal office to protect all his subjects, their

(1) Beverley's case, 4 Co. 124. Fitz. N. B.

> (k) The rule of law, in these cases, is, fieri non debet, sed factum valet; Herbert Perrott's case, 2 Ventr. 30. And Mansfield's case, 12 Co. 123, furnishes a striking instance of the extreme anxiety of courts of law to protect the authority of their records; for though the fine was levied by a man obvioufly an idiot, and by a most gross contrivance; and though Lord Dyer observed, that the judge who had taken it ought never to take another, yet he allowed it to prevail. As, by the common law, a fine might be avoided, on account of fraud, or even on account of infancy. by inspection, during the infancy (Bracton, 436. b. 437. a. Co. Litt. 380. b. See Ferres v. Ferres, 2 Eq. Ca. Ab. 695.) It feems remarkable, that idiocy or lunacy should not have been held entitled to the same effect; but Mansfield's case abundantly proves, that the groffest imbecility of mind was not, at law, a ground of annulling the record. But, in equity, the remainderman was relieved against a fine levied by an idiot, even against a purchaser. Rushloy v. Mansfield, Tothill's Transactions, 42. Vide also Addison v. Mascall, 2 Vern.

their goods, and estates (i); and to prevent all incumbrances, it shall have relation to the disability (2). And this, they said, was no impeachment of the rule, because the idiot or non compos is no party to it; but the whole truth is found by the inquest. But no office could be found after his death (3), because then

(2) 8 Rep. 170.

(3) 4 Co.

678. The Court of Chancery, however, in the case of fraud, does not absolutely set aside or vacate the sine; but, considering those who have taken it under such circumstances as trustees, decrees a reconveyance of the estate to the persons prejudiced by the fraud; and though this does not distinctly appear to be the practice, in the case of sines levied by idiots or lunatics, yet, from the argument in Day v. Hungat, I Roll's Rep. 115. such may be inferred to be the rule of proceeding. 2 Vern. 307. 1 Vez. 289. See Clark v. Ward, Pre. Ch. 150.

(1) "The law not preluming an idiot likely ever to attain any understanding, formerly vested the custody of him and his lands in the lord of the see; and therefore still, by special custom, in some manors, the lord shall have the ordering of idiot and lunatic copyholders; but, by reason of the manifold abuses by subjects, it was at last provided by common consent, that it should be given to the king, as general conservator of his people, in order to prevent the idiot from wasting his estate, and reducing himself and his heirs to poverty and distress. This siscal prerogative of the king is declared

the guardianship of the king was determined (m). And it seems to be upon the same

declared in parliament by statute, 17 Ed. II. c. 9. which directs, in affirmance of the common law, that the king shall have ward of the lands of natural fools, taking the profits, without waste or destruction, (which words, waste and destruction, must be construed in their ordinary, not their technical fense, Oxenden v. Lord Compton. 2 Vez. jun. 71.) and shall find them necessaries; and, after the death of fuch idiot, he shall render the estate to the heirs, in order to prevent such idiots from aliening their lands, and their heirs from being difinherited." 1 Bla. Com. 302. Although the statute refpecting idiots, as also that respecting lunatics, 17 Ed. 2. c. 10. refers only to the lands of the idiot or lunatic, yet it feems that the prerogative extends to the cuftody of his person, his goods, and chattels. Beverley's case, 4 Co. 126. Fitz. N. B. 232. As to the manner in which this branch of the prerogative is vested in the Chancellor, Lord Hardwicke observes, "that before the court of wards was erected, the jurifdiction, both as to idiots and lunatics, was in Chancery; and therefore, all fuch commissions were taken out and returned in Chancery; and after the court of wards was abolished by act of parliament, it reverted back to the court of Chancery; and the fign manual is a standing warrant to the Lord Chancellor or any other officer of the crown (for the grant is not of necessity to the Chancellor) to grant the custody of lunatics, and is a beneficial one in case of idiocy, because the king could not only grant the custody of idiots, but also the rents and profits of their lands." 2 Atk. 553. And, in the matter of Heli, 3 Atk. 635, he states the

fame ground, that bills in Chancery have been brought to fet aside conveyances and

power of the Chancellor to extend to making grants from time to time of the idiot's or lunatic's estates; and as this power is derived under the fign manual, in virtue of the prerogative of the crown, the Chancellor, who is usually invested with it, is responsible to the grown alone for the right exercise of it; and therefore an appeal will not lie to the house of lords, from an order made in lunacy, but must be made to the king in council. 3 P. Wms. 107. Shelden v. Fortescue Aland. Lords' Journals, 14th Feb. 1726. Rochfort v. E. of Ely, 6 Brown's Parl. Ca. 329. It may be material to observe, that though the king may, by scire facias, or by information, avoid all acts done during the incapacity, yet his right to the mesne profits shall have relation only to the time of the office. Tourson's case, 8 Rep. 170. a. Having observed that the king may grant the lands of an idiot, this feems a proper place to refer to the doubt entertained by Lord Chancellor Nottingham, whether fuch grant could be extended to the executors of the grantee, Prodgers v. Phrazier, 1 Vern. 9. The doubt proceeded on the possibility of the executorship devolving on an infant, who, being held incapable of managing his own estate, could fearcely be thought a proper person to be intrusted with the charge of the person and lands of another. The court of King's Bench, however, did, upon an iffue directed in that case, adjudge the grant to be good, holding it to be a trust coupled with an interest, of which an infant is capable. 3 Mod. Rep. 43. Skinner, 177.

and fettlements by idiots and lunatics, though in other respects reasonable, and for the convenience of the samily; for these bills ought properly to be brought by the Attorney-General. Yet there is not a little difference between them. For a lunatic must be a party, as an infant, where a suit is commenced on his behalf (n), because he may recover his understanding; and then he is to have his estate in his own disposal (4). The committee of a non compos is but a bailey, and accountable to him, or his representatives (o). But of

(4) Woolrich's cafe, 1 Chan. Ca.

(m) Though, in strictness, the guardianship of the king may be said to be determined by the death of the lunatic, yet it has been held, that the Chancellor may make an order in lunatic's affairs, after the death of the lunatic. Ex parte Grimstone, Ambler's Rep. 706. See also ex parte Armstrong, 3 Bro. Ch. Rep. 238.

(n) It is faid, in Practical Register, 232, that "if the bill, in nature of an information, is to be relieved against some act done during the lunacy, the lunatic must not be named a party, for that were to stultify himself." Yet it seems the lunatic may be a party to a bill, by his committee, to set aside acts done during his lunacy. Ridler v. Ridler, 1 Eq. Ca. Ab. 279. See p. 44.

(e) The custody of lunatics being a branch of the prerogative, the appointment of the committees must necessarily

an idiot, it is otherwise; for his recovery is not expected by the law; and therefore,

necessarily be in the discretion of the person to whom that branch of the prerogative is entrusted; but, in the exercise of this discretion, certain rules have been regarded, as best calculated to protect the person and interests of the unfortunate lunatic. " To prevent " finister practices," says Sir Wm. Blackstone, 1 Com. 305. "the next heir is feldom permitted to be com-" mittee of the person of the lunatic, because it is his " interest that the party should die. But it hath been " faid, that there lies not the fame objection against " the next of kin, for it is his interest to preferve the " lunatic's life, in order to increase the personal estate " by favings, which he or his family may be intitled " to enjoy: the heir is, therefore, generally made the " manager of the estate, it being clearly his interest, by good management, to keep it in condition, ac-" countable, however, to the court of Chancery, and " to the non compos himself, if he recover, or other-" wife to his administrators." This distinction was, however, very feverely reprobated by Lord Chancellor Macclesfield, in Justice Dormer's case, 2 P. Wms. 264. as founded in barbarous times, before the nation was civilized; but as Mr. Hargrave remarks, it may be obferved, in defence of it, that it gives the custody of the person to those, who, in point of nearness of blood, have equal pretenfions to the charge, without the fame temptation, in point of interest, to abuse it. Lord Chancellor Finch, in Lady Mary Cope's cafe, 2 Ch. Ca. 239. appears, indeed, to have strained the rule beyond its original extent; in deciding, that a half-fifter should not be committee

in the Roman law, he was looked upon as civilly dead. And these bills are now established

committee of the person of the lunatic, because concerned to outlive her. A reason, which, in fact, does not apply; for, as Lord King observed, in Neale's cafe, 2 P. Wms. 544. and in ex parte Ludlow, 2 P. Wms. 638. " the personal estate may increase, and probably will, by good management, during the life of the lunatic; thus, the longer the lunatic lives, it will be the better for the next of kin." And if the committee of a lunatic unnecessarily keeps money in his hands, he shall pay interest, ex parte Chumley, 1 Vez. Jun. 156. But though no committee should get any thing by his appointment, 2 Ch. Ca. 239. Ambler's Rep. 78. yet the allowance for the support of a lunatic fhould be liberal and honourable, 2 P. Wms. 262.; and, if necessary, the court will allow the yearly value of the lunatic's estate, 3 P. Wms. 110. and so anxiously does the court confult the comfort of the lunatic, that it will continue a bankrupt as committee of the person, though it appoint another person to manage the fund for maintenance, ex parte Mildmay, 2 Vez. Jun. 2; and so ffrictly does the court confider the committeeship a mere authority without any interest, that where the custody of the lunatic's estate was granted to husband and wife, the wife being next of kin to the lunatic, Lord Talbot held, that the husband's right was determined by the death of the wife, the grant being joint: ex parte Lyne, Forrester, 143. It must not, however, be inferred from this case, that the husband was necessarily joined in the grant; Lord Parker having held, ex parte Kingsmill, Mich. T. 1720, that the custody of a lunatic may be granted to a feme covert, though not fui juris; and, indeed,

established in equity, where they hold, that the maxim of law before-mentioned is to be

deed, the court will feldom grant the custody to two, and in its choice is influenced by the fex of the parties applying, as well as by other circumstances. Therefore, where two persons equally akin to a seme lunatic, the one a man, the other a woman, applied for the custody, the woman was preferred, as being of the same sex, and better knowing how to take care of her: ex parte Ludlow, 2 P. Wms. 635.

With respect to the powers with which the committee of a lunatic is entrusted, they are necessarily restrained by the object of the trust; and, as a discretionary power might, in some instances, endanger that object, the committee cannot make leases, Knipe v. Palmer, 2 Wilf. 130. nor incumber the lunatic's estate, without special order of the court, though the profits be not fufficient to maintain the lunatic; therefore, in Foster v. Merchant, I Vern. 262. the lunatic, when fane, having mortgaged his estate for 50l. and the committee having afterwards taken up more upon it, the court refused to allow the mortgage to stand as a security for more than the 50l. or to charge the heir of the lunatic with the improvements made by the committee: but the court will allow the committee of a real estate of a lunatic to exercise the fame power over it, in regard to cutting timber for repairs, as any discreet person, who was the absolute owner of it, might do: ex parte Ludlow, 2 Atk. 407. In ex parte Marchioness of Annandale, Ambler's Rep. 81. Lord Hardwicke states it to be, "a rule never departed from, not to vary or change the property of a lunatic, fo as to effect any alteration as to the succession to it;" but in ex parte Grimstone. Ambler's Rep. 706. Lord

be understood, of acts done by the lunatic in prejudice of others, that he should not be admitted to excuse himself on pretence of

Lord Apfley C. decreed incumbrances paid off in the life-time of the lunatic, out of favings of the estate, to be affigned to attend the inheritance, and not in trust for the next of kin; he confidering the ruling principle in the management of a lunatic's estate to be the doing of that which is most beneficial to the lunatic. And it is upon this principle, that the court will order part of the lunatic's personal estate to be laid out in repairs, or even upon improvements of his real estate, if the interest of the lunatic requires it, and the next of kin cannot shew good cause against it. Serjeson v. Sealy, 2 Atk. 414. Oxenden v. Lord Compton, 2 Vez. Jun. 69. But fee Awdley v. Awdley, 2 Vern. 192. That the produce of timber felled by the committee of a lunatic, by the direction of the court, belongs to the personal representative of the lunatic, see ex parte Bromfield, 4 Bro. Ch. Rep. 231. Oxenden v. Lord Compton, 2 Vez. Jun. 69.

As to the authority of the court, to enforce the production of persons suspected to be idiots or lunatics, it seems clearly established, that, upon the commission being sued out, the person having the lunatic must, when required, produce him. Lady Wenman's case, P. Wms. 701. ex parte Ludlow, 2 P. Wms. 638. And though it was formerly doubted, it now seems to be settled, that a commission may be sued out against a lunatic resident abroad, and may be executed where his mansion house was: ex parte Southcote, Ambler's Rep.

of lunacy; but not as to acts done by him in prejudice of himfelf, for this can have no foundation in reason and natural justice.

Rep. 109. And a person sound a lunatic by a competent jurisdiction abroad, may be considered a lunatic here. Ex parte Gillam, 2 Vez. Jun. 588.

By 4 Geo. 2. c. 10. lunatics being trustees or mortgagees, are empowered by themselves, or by their committees, to convey the estates of which they are seized in trust or mortgage; but it is doubtful whether the words of the act include all lunatics, as well such as are at large, as those of whom custody has been granted under the great seal: ex parte Marchioness of Annandale, Ambler's Rep. 80. It is however settled, that a commission of lunacy must have issued. Ex parte-Gillam, 2 Vez. Jun. 588. 15 G. 3. c. 30. enacts, that the marriage of a person duly sound a lunatic, shall be null and void, unless he be previously declared sane by the Lord Chancellor, or his trustees.

SECTION III.

AS for the question, who shall be deemed an idiot, or non compos, no certain rule can be laid down. But it must be left to the wisdom and discretion of those to whom the law has entrusted the

(1) Fitzherbert, Na. Bre: 518. 6th ed: the trial of it (p). And although a man be found an idiot by inquisition (1), he may

(p) An idiot, or natural fool, is one that hath had no understanding from his nativity, and is therefore by law prefumed never likely to attain any. 1 Bla. Com. c. 8. p. 302. If a person be born deaf, dumb, and blind, he being supposed incapable of any underflanding, as wanting all those sources which furnish ideas, the law will confider him as an idiot. Co. Litt. 42. b. But though an idiot must be so a nativitate, yet, it feems to have been held in the King's Bench, that if by inquisition it be found that A. is an idiot, not having had any lucid intervals per spatium octo annorum, this is a fufficient finding; for the inquifition having found the party an idiot, the adding of the words fpatium octo annorum is furplufage, and shall be rejected. Prodgers v. Phrazier, 3 Mod. 43. Skin-Lord Donegal's cafe, 2 Vez. 408. ner, 177. the fame inquisition being originally questioned in Chancery, the Lord Chancellor was of opinion, that it was utterly void. Prodgers v. Phrazier, 1 Vern. 12.

"A lunatic is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his senses. A lunatic is, indeed, properly, one that hath lucid intervals; sometimes enjoying his senses, and sometimes not, and that frequently depending upon the change of the moon. But, under the general name of non compos mentis, which, Sir Edward Coke says, is the most legal name, are comprised, not only lunatics, but persons under phrenzies, or who lose their intellects by disease; those that grow deas, dumb, and blind, not being born so; or such, in short, as are judged

may after pray to be examined in Chancery (q). Yet this is not to be extended to every

judged by the court of Chancery incapable of conducting their own affairs." 1 Bla. Com. 304. I was induced to transcribe the whole of the above paffage, in order to obviate the error into which the learned commentator feems to have fallen in the concluding fentence. The rules of judging upon the point of infanity being the fame at law and in equity, (Ofmond v. Fitzroy, 3 P. Wms. 130. Bennett v. Vade, 2 Atk. 327.) the court of Chancery cannot affume any kind of discretion upon the subject; and therefore, in ex parte Barnesley, 3 Atk. 168. the return of the inquest, stating that W. B. was, at the time of taking the inquisition, from the weakness of his mind, incapable of governing himfelf, and his lands and tenements, it was held illegal and void; and many adjudged cases being cited to the same effect, Lord Hardwicke congratulated himself, that, upon fearch of precedents, the court " had not gone further, in departing from the legal definition of a lunatic, than in allowing returns of non compos mentis, or infanæ mentis, or fince the proceedings had been in English, of unfound mind, which amounts to the fame thing." And in Lord Donegal's cafe, 2 Vezey, 407. he, upon the fame principle, refused a commission of lunacy, though he admitted the weakness of Lord Donegal's understanding to be extreme.

But though courts of equity, in judging upon the point of infanity, is governed by the rules of law, yet, if a man, by age or disease, is reduced to a state of debility of mind, which, though short of lunacy, renders

every person of a weak understanding, unless there be some fraud or surprise (r); for

ders him unequal to the management of his affairs, the court will, in respect of his infirmities, if the demand in question be but small, appoint a guardian to answer for him, or to do fuch other acts, as his interest, or the rights of others, may require. 3 P.Wms. 111. Note B. refers to Anon. case, p. Lord Talbot, Mich. 1733. And in ex parte Nadin, 4th Nov. 1786, Lord C. Thurlow faid, that he was not against the practice of finding a man a lunatic who was, by the infirmities of age, rendered unequal to the management of his affairs; but the more usual course is to appoint him a guardian, (Living v. Calverly, Pre. Ch. 229. Gilb. Rep. 4.) or some person to act for him, in the receiving and managing of his property. Ex parte Bird, 4 Bro. Ch. Rep. 100. As to the general rules of determining what shall be confidered a lucid interval, where previous lunacy has been proved or admitted, fee Attorney General v. Panther, Ch. Hil. T. 1792. p. 65. note (x).

(q) The 2 Ed. 6. c. 8. f. 6. also provides, that "if any be or shall be untruly found lunatic, &c. that every person or persons grieved or to be grieved by any such office or inquisition, shall and may have his or their traverse to the same immediately, or after, at his or their pleasure, and proceed to trial therein, and have like remedy and advantage, as in other cases of traverse upon untrue inquisitions or offices sounden." It has been doubted, however, whether the party aggrieved by the inquisition must not apply to Chancery, notwithstanding this provision of the statute: Ley, 26, 27. Certain it is that he must apply, in order to surpress.

for courts of equity would have enough to do, if they were to examine into the wifdom

pend the grant of the custody of the person, which regularly is immediate upon the return of the inquest; though, according to 18 Hen. 6. c. 4. the custody of the land ought not to be granted till a month after, in order that the parties affected by it may have time to traverse it: ex parte Roberts, 3 Atk. 5. For the doctrine of traverfing an inquisition, see the cases referred to, in ex parte Roberts, 3 Atk. 7. 311. 2 Ed. 6. gives the right to traverse to all persons aggrieved by the inquisition; yet the heir may not traverse it, but is bound upon the traverse by the lunatic, or his alienee, who may traverse it: ex parte Roberts, 3 Atk. 308. 1 Ch. Ca. 113. In case of the lunatic's recovery, he must petition the Chancellor to superfede the commission; upon the hearing of which, the lunatic should attend in person, that he may be inspected by the Chancellor: it is also usual for the physician to attend, or to make an affidavit that the lunatic is perfectly recovered.

(r) It has been already observed, that mere weakness of understanding is not a sufficient ground to support a commission of lunacy; it surnishes, however, a strong ground of suspicion, that persons in such state, executing conveyances, are acted upon by some improper influence; and, therefore, wherever fraud or surprise can be imputed to, or collected from the circumstances of the transaction, equity will interpose, and relieve against it. Wright v. Booth, Toth. 101, 102. White v. Small, 2 Ch. Ca. 103. Jones v. Crawley, Finch, 161. Clarkson v. Hanway, 2 P. Vol. I.

wisdom and prudence of men in disposing of their estates. Let a man be wise, therefore, or unwise, if he be legally compos mentis, he is a disposer of his property,

Wms. 203. James v. Graves, 2 P. Wms. 270. Ofmond v. Fitzroy, 3 P. Wms. 130. Portlington v. Eglington, 2 Vern. 189. Bennett v. Vade, 2 Atk. 324. Lord Donegal's cafe, 2 Vez. 407. It is faid, however, that it must not be understood, from cases of this kind being generally brought into equity, that our courts of law are incompetent to relieve; for where the fraud can be clearly established, courts of law exercife a concurrent jurisdiction with courts of equity, Bright v. Eynon, I Burrows, 396. and will relieve, by making void the instrument obtained by such corrupt agreement or fraud. But fee Simpson v. Vaughan, 2 Atk. 31. Wood's Institute, 296. Therefore, where the obligor was an unlettered man, and the bond was not read over to him, he was allowed to plead this circumstance in an action on the bond. 9 H. 5. fol. 15. cited in Henry Pigot's cafe, 11 Co. 27. b. So if the bond be in part read to an unlettered man, and some of its material contents be omitted or mifrepresented, see 2 Roll's Ab. 28. pl. 8. Finch's Law, 109. and cafes there referred to. I mean not, in this place, to discuss the question, whether courts of law have, in all cases of fraud, a concurrent jurisdiction with courts of equity; but think it material to observe, that Lord Coke, by the same passage, 3 Inst. 84. in which he confines the jurisdiction of courts of equity to such " frauds, covins, and deceit, for which there is no remedy by the ordinary course of law," seems to admit, that all frauds were not relievable at law.

and

and his will stands instead of a reason (2). And although drunkenness is a kind of infanity for the time, yet, as it is of his own procuring, it shall not turn to his avail, either to derogate from his act, or to lessen his punishment, but it is a great offence in itself (s). And this holds as well to his life (3), his lands, goods, or any thing concerning him. However, equity (t), as it feems, will relieve in this case (4); especially if it were caused by the fraud or contrivance of the other party (5), and he is so excessively drunk, that he is utterly deprived of the use of reason or understanding: for it can by no means be a ferious and deliberate confent;

(2) Bath and Montague's cafe 3 Ch. Ca. 107-Heineccius, c. 14. f. 392.

(3) 1 Inft. 247. Plowden, 19. 1 Hales, P. C. 32. 1 Hawkins, P. C. 3. (4) Rich v. Sydenham, 1 Ch. Ca, 202.

(5) Johnson v. Medlicott, 3 P. Wms. 130. note (A).

(s) Vide Cole v. Robins, H. 2 An. per Holt, which is referred to by Mr. Justice Buller, in his nisi prius, p. 172. as shewing, that upon non est factum, defendant may give in evidence, that they made him sign the bond when he was so drunk that he did not know what he did.

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(t) Lord Hardwicke, in Cory v. Cory, I Vez. 19. was of opinion, that the drunkenness of one of the parties was not sufficient to set aside an agreement, unless some unfair advantage was taken; and, therefore, in the case before him, the agreement being reasonable, and no unfair advantage appearing to have been taken, he resused to set it aside, though the party complaining of it was drunk when he executed it.

F 2

and

and, without this, no contract can be binding by the law of nature. And so, although there is no direct proof that a man is non compos, or delirious, yet, if he is of a weak understanding, and is harassed and uneasy at the time; or if the deed be executed in extremis; or by a paralytic; it cannot be supposed he had a mind adequate to the business he was about, and might more easily be imposed upon (6); especially the provision in the deed being something extraordinary (u),

(6) Filmer v.
Gott, 7 Bro.
P. C. 70. Fane
v. D. of Devonthire, 2 Bro.
P. C. 77.

(u) In James v. Graves, 2 P. Wms. 270. Lord Commissioner Jekyll seems to lay some stress upon the circumftance of a deed not being revocable as a will, and therefore liable to be fet aside, if gained from a weak man by mifrepresentation, and without any valuable confideration. But it appears from the case of Fane v. D. of Devonshire, 2 Brown's Parl. Ca. 77. that though a deed obtained in extremis, and by imposition, do contain a clause of revocation, the principles upon which courts of equity proceed, will equally attach and intitle the party prejudiced to be relieved against it. Whether courts of equity could interpose, and relieve against fraud practifed in the obtaining of a will, appears to have been formerly a point of confiderable doubt. In some cases, we find the court of Chancery distinctly afferting its jurisdiction; as in Maundy v. Maundy, 1 Ch. Rep. 66. Welly v. Thornagh, Pre. Ch. 123. Gofs v. Tracy, 1 P. Wms. 287. 2 Vern. 700.;

or

or the conveyance without any confideration (7). And the rule of the common law itself, in case of wills, is very favourable; although it can hardly, perhaps, be extended to deeds, without circumstances of fraud or imposition. For a memory, which the law holds there to be a sound memory, is, when the testator hath understanding to dispose of his estate with judgment and discretion, which is to be collected from his words, actions, and behaviour, at the time (x), and not from

(7) Clarkfon v. Hanway, 2 P. Wms. 203. Bridgeman v. Green, 2 Vez. 627. Bennet v. Vade, 2 Atk. 324.

in other cases, disclaiming such jurisdiction, though the fraud was gross and palpable; as in Roberts v. Wynne, 1 Ch. Rep. 125. Archer v. Moss, 2 Vern. 8.; and in other cases, steering a middle course, by declaring the party who had practifed the fraud a truftee for the party prejudiced by it, Herbert v. Lownes, 1 Ch. Rep. 13. Thynn v. Thynn, I Vern. 296. Devenish v. Baines, Pre. Ch. 3. Barnesly v. Powell, I Vez. 287. See Marriott v. Marriott, Str. 666. That an action at law, will lie upon a promife, that if the devisor would not charge the land with a rent charge, the devisee would pay a certain fum to the intended legatee of the rent, See Rockwood v. Rockwood, 1 Leon. 192. Cro. Eliz. 163. See also Dutton v. Poole. 1 Vent. 318. 332. Beringer v. Beringer, 16 June, 26 Car. 2. Chamberlain v. Chamberlain, 2 Freem. 34. Leicester v. Foxcroft, cited Gilb. Rep. 11. Reech v. Kenningall, 26 October, 1748.

(8) Marquis of Winchester's cafe, 6 Co. 23. Herbert v. Lownes 1 Ch. Rep. 13.

his giving a plain answer to a common question (8). And therefore, a will obtained in extremis, and upon importunity

But fince the cases of Kenrick v. Bransby, 3 Brown's P. C. 358. and Webb v. Cleverden, 2 Atk. 424. it appears to have been fettled, that a will cannot be fet afide in equity for fraud and imposition, because a will of personal estate may be set aside for fraud in the ecclefiaffical court, and a will of real effate may be fet aside at law: for in such cases, as the animus testandi is wanting, it cannot be confidered as a will. Bennett v. Vade, 2 Atk. 324. Anon. 3 Atk. 17. Though equity will not fet aside a will for fraud, nor restrain the probate of it in the proper court, yet, if the fraud be proved, it will not affift the party practifing it, but will leave him to make what advantage he can of Nelson v. Oldfield, 2 Vern. 76. but if the validity of the will has been already determined and acted upon, equity will restrain proceedings in the prerogative court to controvert its validity. Sheffield v. Duchels of Buckingham, 1 Atk. 628. Lord Hardwicke having admitted, that a court of equity cannot fet afide a will for fraud, observes, in the above case of Sheffield v. Duchels of Buckingham, that "the admission of a fact by a party concerned, and who is most likely to know it, is stronger than if determined by a jury; and facts are as properly concluded by an admission, as by a trial." That the party prejudiced by the fraud may file a bill for a discovery of all its circumstances, is unquestion-Supposing, then, the defendant to admit the fraud; if the admission is to have the effect ascribed to it by Lord Hardwicke, it still remains to be determined,

how

of the testator's wife, his hand being guided in the writing of his name, may be set aside (9).

(9) Money-

Brown, 15th May 1711. 8 Viner's Ab. 167, pl. 7

how a court of equity ought to proceed. If it could not relieve, it would follow, as a consequence, that so much of the bill as seeks relief, would be demurrable; but the invariable practice in such cases is to seek relief, and the issue directed is to furnish the ground upon which the court is to proceed in giving such relief.

(x) "There is an infinite, nay, almost unsurmountable difficulty, in laying down abstract propositions upon a fubject, which depends upon fuch a variety of circumstances, as the legal competency of the mind to the act in which it is engaged, if its competency be impeached by positive evidence of an anterior derangement, or affected by circumstances of bodily debility sufficiently strong to lead to a suspicion of intellectual incapacity. General rules are eafily framed. The difficulty arises on the application of them; for few are fufficiently comprehensive to embrace every circumstance which may enter into and materially affect the particular case. There can be no difficulty in faying, that if a mind be possessed of itself, that at the period of time when fuch mind acted, it ought to act efficiently. This rule, however, goes very little way; for it is extremely difficult to lay down, with tolerable precision, the rules by which fuch flate of mind can be tried: but the course of procedure, for fuch purpose, allows of rules. If derangement be alledged, it is clearly incumbent on the party alledging it to prove fuch derangement. If fuch derangement be proved, or be admitted to have existed, at any particular period, but a lucid interval be alledged

to have prevailed at the period particularly referred to, then the burthen of proof attaches on the party alledging fuch lucid interval, who must shew fanity and competence at the period when the act was done, and to which the lucid interval refers. And it certainly is of equal importance, that the evidence in support of the allegation of a lucid interval, after derangement at any period has been established, should be as strong, and as demonstrative of such fact, as where the object of the proof is to establish derangement. The evidence in such a case applying to stated intervals, ought to go to the state and habit of the person, and not to the accidental interview of any individual, or to the degree of felf-possession in any particular act; for, from an act, with reference to certain circumstances, and which does not of itself mark the restoration of that mind, which is in general deemed necessary to the disposition and management of affairs, it were extremely dangerous to draw a conclufion fo general, as that the party, who had confesfedly before laboured under a mental derangement, was capable of doing acts binding on himself and others." I have extracted the foregoing passage from the very able and elaborate judgment given by Lord Chancellor Thurlow, on a motion for a new trial, in the Attorney-General v. Panther, Hil. T. 1792. which judgment is with fome flight difference reported in Mr. Brown's third volume of Reports in Chancery. p. 441.

SECTION IV.

A ND the grants of infants and lunatics are parallel both in law and reason (1); for infants are disabled, by a maxim in (1) 3 Mod. law, to contract for any thing but necessaries for their persons (y), suitable to their degree

(y) As necessaries for an infant's wife are necessaries for him, he is chargeable for them, unless provided before the marriage; in which case he is not chargeable, though she uses them afterwards. Trifby, 1 Stra. 168. An infant is also liable to an action for the nurfing of his lawful child; nam perfona conjuncta æquiparatur interesse proprio. Bacon's Maxims, Reg. 18. But though an infant may if not provided for, Bainbridge v. Pickering, Bla. Rep. 1325. contract for necessaries, he cannot borrow money to buy them, for he may misapply the money; and therefore the law will not trust him, but at the peril of the lender, who must lay it out for him, or see it laid out, and then it is his providing, and his laying out fo much money for necessaries for him. Earle v. Peale. 1 Salk. 387. Darby v. Boucher, 1 Salk. 279. Barlow v. Grant, 1 Vern. 255. But in Marlow v. Pitfield, 1 P. Wms. 559. the Master of the Rolls held, that if one lend money to an infant to pay a debt for necessaries, and, in confequence thereof, the infant does pay the debt, although he may not be liable at law, he must, nevertheless, be so in equity; for the lender of the money stands in the place of the person paid, viz. the

(2) Co. Litt. 172. Cro. Jac. 560. 494. 1 Lev. 86. (3) Macka-

degree and quality (2). And what is necessary, or not, shall be tried by the judges, and not by a jury (3). Which maxim was sell v. Bachelor, Cro. Eliz. 583. grounded

> creditor, for necessaries, and shall recover in equity, as the other might have done at law; and, on the same principle, it was decreed, that the lender of money to a feme covert for such purpose, it having been so applied, might, in equity, recover against the husband. Harris v. Lee, 1 P. Wms. 483. That an executor may pay an infant a legacy for the purpose of necessaries, see Davis v. Austen, 3 Bro. Ch. Rep. 179. Philips v. Paget, 2 Atk. 80. In what cases such payment may be made to the father, see Cooper v. Thornton, 3 Bro. Ch. Rep. 96. 186. Respecting marriage fettlements by infants, though there be no decision, that a male infant may fettle his real estate, yet it is now fettled, that a female infant may bar her dower, by consenting to a jointure in lieu thereof, if made agreeable to the 27 H. 8. c. 10. Earl of Buckinghamshire v. Drury, 5 Bro. P. C. 570. Jordan v. Savage, 2 Eq. Ca. Ab. 101, 102. It also seems to have been decided, that the interest of a female infant, in a money portion, may be bound by agreement on her marriage; for fays Lord Hardwicke, if a parent or guardian cannot contract for the infant, fo as to bind her personal property, the husband, as it is a personal thing, would he intitled to it absolutely upon the marriage. Harvey v. Ashley, 2 Atk. 613. But how far the real estate of an infant can be bound by any agreement entered into during infancy, appears to be still subject to some doubt. In Cannel v. Buckle, 2 P. Wms. 243. Lord Macclesfield held, that " if a feme infant feifed

grounded upon a presumption, that infants most commonly, before they are of the age of twenty-one years, are not able

in fee, on a marriage with the confent of her guardians, should covenant, in consideration of a settlement, to convey her inheritance to her husband, if in consideration of a competent fettlement, equity would execute the agreement." "This Lord Hardwicke (in the above case of Harvey v. Ashley) observes, is going a great way, as it related to the inheritance of the wife; but yet there are cases where the court will do it, as if the lands of the wife were no more than an adequate confideration for the fettlement that the husband makes; and, after the marriage, the wife should die, and leave iffue, who would be intitled to portions provided for them by the fettlement, it would, in that case, be very reasonable to affirm that settlement," From this it appears, that his Lordship considered the leaving of iffue, as well as the adequacy of the fettlement, material to its binding the rights of the infant; and, in another passage in the same case, he assigns, as a reason for applying for an act of parliament, upon the marriage of an infant who has an interest in real estate, that the real estate will not be bound, unless the hufband should have iffue of that marriage. In the case of Durnford v. Lane, 1 Brown's Rep. Ch. 106. Lord Thurlow particularly observes, upon its being required, by the cases of Cannel v. Buckle, and Harvey v. Ashley, that the fettlement should be competent; a confideration, to which, in his opinion, the court could not advert; but, in a subsequent case, Williams v. Williams, I Brown's Rep. Ch. 152. he expressly holds, that

to govern themselves (z); and therefore the law takes upon itself the protection of

that "to bind an infant, the fettlement must be sair and reasonable." Carruthers v. Carruthers, 4 Bro. Ch. Rep. 502. It seems also necessary, in order to support such settlement by a seme infant, that it be made before marriage. Lucy v. Moor, 3 Bro. P. C. 514. Seamer v. Bingham, 3 Atk. 56. Though it has never been determined, that a male infant can, except in the case of a power, (see Hollingshed v. Hollingshed, cited in 2 P. Wms. 229, and p. 72, 78.) do any act to bind his real estate; yet, where a male infant married an adult, who, by settlement upon the marriage, covenanted that her estate should be settled to certain uses, he was held bound by her covenant. Slocombe v. Glubb, 2 Brown's Rep. Ch. 545.

(z) The law of England, while it protects the imbecility of infants, still keeps in view that respect which is due to the fair claims and interests of others, and will not allow that, which, in the emphatical language of Lord Mansfield, was intended as a shield, and not as a fword, to be turned into an offenfive weapon of fraud and injustice; therefore, an infant, conusant of a fraud, shall be as much bound as an adult. Evroy v. Nicholas, 2 Eq. Ca. Ab. 489. Savage v. Foster, 9 Mod. 38. Watts v. Cresswell, M. I G. 1. 9 Vin. Ab. 415. Beckett v. Cordley, 1 Brown's Rep. Ch. 353. But in Sanderson v. Marr, Blackstone's C. P. Term Rep. 75. it was held, that this rule was confined to fuch acts as were only voidable; fee p. 75. and that a warrant of attorney, given by an infant, being absolutely void, the court could not confirm it; though the infant appeared to have given it, knowing that it was not valid,

of their rights, and ordains, that they shall be favoured in all things which are for their benefit, and not prejudiced by any thing to their disadvantage (a). So that

valid, and for the purpose of collusion. But though, in most cases of fraud, an infant is not allowed to take advantage of his own wrong, yet he is not liable at law to an action of deceit. Johnson v. Pie, Siderfin, 258.

(a) If an infant, fays Lord Mansfield, does a right act, which he ought to do, or which he was compellable to do, it shall bind him: as, if he make equal partition; if he pay rent; if he admit a copyholder upon a furrender; for, generally, whatever an infant is bound to do by law, the same shall bind, although he doth it without fuit of law. Zouch v. Parsons, 3 Burrow's Rep. 1801. If an infant enter into a contract, with the advice and concurrence of his friends, and fuch contract appear to be beneficial to the interests of the infant, equity will support, and give it effect; for, otherwise, the rule of law, which restrains the contracting of infants, might operate the most fatal and irreparable prejudice to the very interests it is intended to protect. The 29 G. 2. c. 31. therefore enables infant leffees to furrender their leafes for the purpose of renewal; and courts of equity, consulting the same principle, had held, previously to the act of parliament, that the guardian of an infant might furrender a lease for the purpose of renewal, Mason v. Day. Pre. Ch. 319. Pierson v. Shore, 1 Atk. 480. Where J. S. mortgaged his estate to the plaintiff, and died, leaving the defendant his daughter and heir, who was an infant,

that neither as bailiff, nor for goods to carry on a trade, can an infant be charged;

and had nothing to fubfift on but the rents of the mortgaged estate, and the interest being suffered to run in arrear three years and a half, the plaintiff grew uneafy at it, and threatened to enter on the estate, unless his interest was made principal; upon which, the defendant's mother, with the privity of her nearest relations, stated the account, and the defendant herfelf, who was then near of age, figned it; and the account being admitted to be fair, it was held, that though, regularly, interest shall not carry interest, yet that, in some cases, and upon some circumstances, it would be injustice, if interest were not made principal, and the rather, in this case, because it was for the infant's benefit, who, without this agreement, would have been destitute of subsistence. East, 1699. Earl of Chesterfield v. Lady Cromwell, 1 Eq. Ca. Ab. 287. Upon the fame principle, an infant was held bound by an award made upon a reference, with the confent of his guardian. Bishop of Bath and Wells v. Hippesly, cited by Lord Hardwicke, 3 Atk. 614. So also by a covenant to fettle land, of a certain yearly value, he having a power to fettle the fame by way of jointure. Hollingshed v. Hollingshed, cited 2 P. Wms. 229. and 1 Stra. 604. But if the agreement under all the circumstances which led to it, cannot be construed beneficial to the infant, it will not bind him either in law or equity. If, therefore, an infant execute a bond with a penalty, as it could not be for his benefit to subject himself to a penalty, the law will not support the contract, Co. Litt. 172. a. Moor, 679. Manning v. Knap, Cro. Eliz. 700. Ayliffe v. Archdale, Cro. Eliz. 620. But an obligation for the very fum laid out

charged; because there was no necessity that he should trade, neither does it appear for his advantage (4): and luch con- (4) Co. Litt. tracts as may not be intended for his tingham v. benefit, are absolutely void (b).

172. a. Whit-Hall, Cro. Jac. 494. Smally v.

Smally, 1 Eq. Ca. Ab. p. 6. pl. 3. Williams v. Harrison, Carthew, 160. Wywall v. Champion, 2 Stra. 1083.

out for necessaries will be good, S.C. Neither can an action be fustained against an infant on a stated account; for the nature of the action would, in firicinefs, preclude him from impeaching the confideration and particulars of the account. Freeman v. Hurst, I Term Rep. 40. and Bartlett v. Emery, therein cited. Yet it may be inferred, from the case of Freeman v. Hurst, that an action will lie on a promissory note, or other negotiable fecurity, given by an infant for neceffaries; quere, whether, in fuch action, by a third perfon, he would be precluded from impeaching the confideration of it. That fuch action would lie does not break in upon the authority of Williams v. Harrison. Carth. 160. for, in that case, the court seem to have relied upon the circumstance of the security being given in the course of trade, and not for necessaries.

If the particular measure proposed be doubtful in its tendency, the more prudent course for trustees to purfue, is to feek the indemnity of a court of equity, which will direct one of its officers to inquire and report, whether the measure be, or be not, in its probable effect, beneficial to the infant. The case of Hallett v. James, 1 July 1794. 10 March 1795. at the Rolls, is a very strong instance of the utility of such course of proceeding. See also Cecil v. E. of Salisbury, 2 Vern. 224. Kilvington v. Harrison, 22 July 1794, Rolls.

(b) It has been already observed, that the contracts of infants, which cannot, under all the circumstances which led to them, be construed favourable to their interests, shall not bind them either in law or equity; but our author, from the above passage, seems to have confidered fuch contracts as absolutely void; and in that opinion he is certainly fanctioned by fome very high and respectable authorities. Vide Holt v. Ward, Fitzgibbon's Rep. 175. 275. Harvey v. Ashley, 3 Atk. 610. Such opinion, however, has been often controverted, and particularly in the case of Zouch v. Parsons, 3 Burr. 1794. as liable to many objections; for if it were true, that all fuch contracts were absolutely void, it would follow, as a confequence, that fuch contract could operate no effect, and the party contracting with the infant would be discharged from it, as well as the infant: but there are numberless cases to prove that the party contracting with the infant cannot avail himself of the infancy. Smith v. Bowin, 1 Mod. 25. Holt v. Clarencieux, Stra. 937. Clayton v. Ashdown, 9 Vin. Ab. 393, 394. It would also follow, as a further consequence, that no such contract could, by any subsequent circumstance, acquire validity; nam quod ab initio non valet in tractu temporis non convalescet; whereas there are many cases of contracts, which, in their origin, could not be confidered as beneficial to the infant, which have been allowed by the subsequent confirmation of the infant. As where an infant borrowed a fum of money, for which he gave a bond, and then devised his personal estate for payment of his debts, particularly those he had fet his hand to, the bond was decreed to be paid, notwithstanding the minority of the obligor. Hamp-Son v. Lady Sydenham, Nelfon's Ch. Rep. 55. also notes to ch. 2. f. 13. But "if this bond had been void at law, no new agreement would have made

it better, the original corruption would have infected it throughout." P. Lord Hardwicke, Chesterfield v. Janssen, 1 Atk. 354. Lord Raymond, in the case of Holt v. Clarencieux, states the rule to be, that where the contract may be for the benefit of the infant, or to his prejudice, the law fo far protects him, as to give him an opportunity to confider it when he comes of age, and it is good or voidable at his election.—In the case of Zouch v. Parsons, the court of King's Bench adopted the distinction taken by Perkins, (section 12.) " that all such gifts, grants, or deeds, made by infants, which do not take effect by delivery of his hand, are void: but all gifts, grants, or deeds, made by infants, by matter, in deed, or in writing, which do take effect by delivery of his hand, are voidable by himfelf, by his heirs, and by those who have his estate," Upon which Lord Mansfield obferves, that the words " which do take effect," are an effential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power, and convey no interest." As an infant is not capable by law of binding his real estate by any conveyance, it becomes necessary that he should have a day to shew cause against any decree, which requires him to join in a conveyance of the inheritance, yet he is bound by a decree of fale of his estate. Booth v. Rich, 1 Vern. 295. Cooke v. Parsons, 2 Vern. 429. And in the case of Lord Brook v. Lord and Lady Hereford, 2 P. Wms. 518. it was held, that an infant, when plaintiff, was as much bound, and as little privileged, as one of full age; and fo Lord Hardwicke held, in Gregory v. Molefworth, 3 Atk. 626. unlefs grofs laches, or fraud and collusion, appear in the prochein amy; and then the infant might open it by a new bill. An infant may also be relieved against a flip by his counsel in mispleading. Savage v. Whit-VOL. I. bread.

bread, 3 Ch. Rep. 14. 3d Ed. Sir John Napier v. Lady Effingham, 2 P. Wms. 401. Fountain v. Caine, 1 P. Wms. 504. Bennett v. Lee, 2 Atk. 531. or may put in a new answer. Fountain v. Caine, 1 P. Wms. 504. and may have fuch decree as his cafe requires, though not particularly prayed by his bill. Stapleton v. Stapleton, I Atk. 6. But, except in these cases, or by special order of the court, an infant is bound by decree. Whitchurch v. Whitchurch, o Mod. 128. And in the case of a decree of foreclosure, though he have fix months to shew cause against it, after he attains his age, yet he is not to ravel into the accounts, nor intitled to redeem, but merely intitled to fhew error in the decree. Mallack v. Galton, 3 P.Wms. 352. Lyne v. Willis, Rolls, 19th May 1730. Bp. of Winchester v. Beavor, 3 Vez. Jun. 317. But for the reverfal of a decree an infant may prefer a bill of review, though upwards of twenty years have intervened. Lytton v. Lytton, 4 Bro. 441.

SECTION V.

(1) Godolphin, 103. Went. Office of Executor, 214. 5 Rep. 27. 6 Rep. 67. aBla.Com. 503. BUT an infant may be an executor (1), and of consequence may be charged for what he does as executor, according to law (c), because the law enables him; and

(c) But if an infant be appointed executor, admini-Aration must be granted to his guardian, or next friend, durante and if he does any thing to which he is compellable by law, it is good, and will bind him (2). And although a fine or recovery

(2) Co. Litt, 172. a.

durante minori ætate, which administration was, at common law, determined by the infant executor's attaining 17. Pigot's case, 5 Rep. 29. a. but, by the 28 G. 3. c. 87. fuch administration is continued until the infant attain the age of 21. And before he attain fuch age, he cannot affent to a legacy. Prince's cafe, 5 Rep. 29. b. and, even then, his affent will not bind him, unless he have affets for debts. Chamberlain v. Chamberlain, 1 Ch. Ca. 257. Yet, though an infant may administer, it is said, that he cannot commit a devastavit till 21. Whitmore v. Weld, I Vern. 326. which appears extraordinary, confidering that an infant may dispose of his own estate at 17, or 15, if proved to be of discretion. Bishop v. Sharp, 2 Vern. 469. An infant may also be a trustee. Jevon v. Bush. I Vern. 342. and by 7 Anne, c. 19. an infant is, as trustee or mortgagee, enabled to convey the estates he holds in trust or mortgage; though the estate be abroad. Ex parte Roffer, 2 Bro. 365. But the master must report to whom he is to convey. Winnington v. Foley, 1 P. Wms. 538. Anon. Pre. Ch. 284. Ex parte Brook, 16 March 1793. Rolls; which power (though formerly doubted, 3 Atk. 164.) has been conftrued to authorife him to convey by common recovery: ex parte ohnson, 3 Atk. 559, ex parte Smith, Ambler's Rep. 624. and if the infant trustee be also a feme covert, the court may direct her to convey by fine: ex parte Maire, 3 Atk. 479. Anon. Comyn's Rep. 615.; but the infant must be an express and purely a trustee, and the trust in writing, and not a merely constructive G e truft:

(3) 2 Roll's Ab. 25. 2 Bulttrode, 320. 2 Ventr, 30. 2 Lev. 36.

recovery is never taken from an infant (3), for it is against the duty and office of the judge and commissioners, if they know of

trust: ex parte Vernon, 2 P. Wms. 549. Godwyn v. Lister, 3 P. Wms. 387. Hawkins v. Obeen, 2 Vez. 559. And by 29 G. 2. c. 31. infants may furrender leafes in the court of Chancery, in order to renew the fame. An infant may also present to a vacant benefice, of which he is patron; Co. Litt. 89. a. 172. a. because a presentation is not a thing of profit, of which a guardian can make any benefit. Hearle v. Greenbank, 3 Atk. 710. Mr. Hargrave, in his edition of Coke upon Littleton, (note 1. p. 89. a.) very properly observes, that though the decision of Lord King, in the case of Arthington v. Coverley, 2 Eq. Ca. Ab. 518. " may remove all doubts about the legal right of an infant of the most tender age to present, still it remains to be feen, whether the want of difcretion would induce a court of equity to control the exercise, where a presentation is obtained from an infant, without the concurrence of the guardian." These several instances of infants being allowed to act, clearly fall within the rule laid down by Lord Mansfield, in the case of · Zouch v. Parsons, that the acts of an infant, which do not touch his interest, but take effect from an authority which he is trufted to execute, are binding. It remains, however, to observe, that, in the case of Hollingshed v. Hollingshed, cited in 2 P. Wms. 229. and in Stra. 604. tenant in tail, empowered to make a jointure, fo as fuch jointure did not exceed a moiety of the estate, was held to have executed the power by a covenant, during his infancy, with his wife's relations, that he would, within fix months after he came

of it; yet, if it be taken, and not reverfed, during his minority, it is unavoidable. And there is no way to vacate it at law, because his age is triable only by inspection (d); and no man would be fure

of age, fettle fo much of the land as should amount to Tool. per annum, upon his then intended wife for life. This covenant clearly affected his interest, yet was held binding, perhaps, from the nature of the power, which, being to fettle lands in jointure, implied the right of executing it during infancy; for, as he might contract marriage during infancy, to which dower was incidental, if he had not been allowed to execute the power, by making the jointure in lieu of dower, previous to the marriage, the power afterwards might have been a mere nullity. This cafe, however, feems to have escaped the attention of Lord Hardwicke, he obferving, that "there is no precedent, either in a court of law or equity, where it has been held, a power over real estate, executed by an infant, is good." 3 Atk. 710. See also Jackson v. Jackson, 4 Bro. Ch. Rep. 462. in which Hollingshed v. Hollingshed is obferved upon.

(d) It appears, from the Rolls of Parliament, 50 Ed. 3. No. 127. vol. 2. p. 342. that the commons, confidering this rule of law as a great hardship, petitioned that infants might be allowed a certain time, after they attained their full age, to reverse the fines which they had levied during their infancy; to which petition the king answered, that he would consider whether it would be proper to alter the old law in this point, or not.

(4) 12 Rep. 122. 2 Inft. 483. fure of his inheritance, if records might be avoided by averments (4). However, fome-

No alteration, however, has taken place, from an apprehension, that many inconveniencies might result from avoiding records by bare averments. But, if the person of an infant be inspected by the judges, and it is once recorded that he is within age, although the infant should die, or attain his full age, before the fine is reverfed, yet he or his heirs may reverse it at any time afterwards, Mo. 844. Co. Litt. 131. a. So, if an infant fuffer a common recovery, in which he appears by attorney, he may reverse it at any time, after he has attained his full age; as it may be tried by a jury, whether he was an infant, or not, when he appointed an attorney. The reason of which, Mr. Cruise observes, is, because an infant is not presumed to have fufficient understanding to choose a proper person as his attorney, and the law will not put it in his power to hurt himself; for if he is deceived and prejudiced by the recovery, he can have no remedy against his attorney. Cruife upon Recoveries, 145. And this is agreeable to the distinction taken by Lord Mansfield, in the case of Zouch v. Parsons :- " If an infant is permitted to fuffer a common recovery, he must make a tenant to the præcipe by feoffment, and give livery of feifin in person, by which means the feoffment is only voidable; whereas, if the infant appointed an attorney to give livery of feifin for him, the feoffment then would be abfolutely void." It may be proper to observe, that not only fines and recoveries, but all other matters of record, not avoided by an infant during his minority, are binding. Co. Litt. 380. b. 2 Inft. 483. infant acknowledge a recognizance, statute merchant,

fometimes recoveries (e) have been admitted upon privy feals, upon the petitions of fathers upon the marriage of their fons (5), but now it is but rarely fuffered, on account of the mischiefs it occasioned (6). But certain it is, they may be charged for trespasses which are vi et armis; and fo, it feems, in trover, because a tort (7). And although they are not capable of doing an injury knowingly, it is fufficient that they are the physical cause of a damage they had no right to do. The law of England makes a difference, therefore, between crimes and trefpasses; and, in the one, considers the intent, but, in the other, only the damage

- (¿) Blunt's case, Hob. 196. 1 Vern. 461.
- (6) Sir John St. Alban's case, 2 Salk. 567.
- (7) Smally v. Smally, 1 Eq. Ca. Ab. 6. Trin. 1780. But fee Siderfin, 258. 9 Vin. Ab. 395. (H. 2.)

or statute staple, or obligation in the nature of a statute staple, or inrol an obligation, in all these cases he must avoid it in an audita querela during his minority; but if an infant bargain and sell lands, which are, in the realty by deed, indented and inrolled, he may avoid it when he will, for the deed was of no effect to raise an use. 2 Inst. 673. And as a fine, or recovery, not avoided by an infant during his minority, cannot be afterwards set aside, so neither shall the declaration of the uses. 2 Rep. 58. a. 10 Rep. 42. b.

(e) Though a recovery might be suffered by an infant, by the king's special directions, yet a fine could not be taken from him. Sir H. Mackworth's case,

1 Vern.

done (e). For the obligation to restitution arises from the thing itself, and natural equity; but punishments are for the example, and to deter others. Neither did the court ever pretend to change the nature of infants estates (f), or to make that

- 1 Vern. 461. The practice of applying for a privy feal has been for some time discontinued; private acts of parliament being found, in every particular, more suitable to the purpose.
- (e) See Mr. Erskine's Vindication of the Rights of Juries, in which this distinction is most luminously considered, and incontrovertibly established.
- (f) It feems admitted, in the case of Lord Winchelfea v. Norcliffe, 1 Vern. 435. that the nature of an infant's estate may be changed by the decree of the court; and in Inword v. Twyne, Ambler's Rep. 417. the Chancellor not only recognized the right of the court; but further observed, that he thought guardians and trustees might change the nature of an infant's estate, where it is manifestly for the interest of the infant. And in Palmer v. Danby, Pre. Ch. 137. the court held that the guardian might, without the direction of the court, pay the interest of any real incumbrance, and the principal of a mortgage, because that is a direct and immediate charge upon the land, but not upon any other real incumbrance. The question, as to the power of a trustee to change the nature of the infant's estate, arising in Vernon v. Vernon, Ch. Nov. 1789, Lord Chancellor Thurlow stated it to be a general rule, that a truffee

that absolute which was defeasible. So that where an estate is given to an infant upon a condition (g), such acts as an infant

trustee should not ad libitum change the nature of an infant's estate; but held, that the trustees, in that case, having applied the personal estate of the infant in performance or satisfaction of a condition, upon which the infant was intitled to a real estate, was not a ground for raising a trust against the heir, in savour of the personal representative of the infant. The cases of Tullit v. Tullit, Ambler's Rep. 370. and Mason v. Mason, in 1724, recognized in Tullit v. Tullit, lay down another distinction upon this subject; namely, that where the guardian of an infant, tenant in tail, cuts down timber, the money produced by the sale of it shall be considered as personal estate; but if the infant be tenant in fee, the money shall be considered as real estate.

(g) In Whittingham's case, 8 Rep. 44. the diversities are taken by Lord Coke, betwixt conditions in sact that are expressed, as to pay money, or to do, or not to do, some particular act, and conditions in law that are implied, and which are distinguishable, as conditions by the common law, and by statute; and conditions by the common law, he observes, are of two sorts, one sounded on skill and considence, the other not; and conditions by statute are also of two qualities, scil, when the statute for execution of the condition in law gives recovery, and when the statute gives an entry, and no recovery. As to the condition in law, sounded on skill and considence, as a steward-ship in see, if the condition be broken, the infant is barred for ever; not so where the condition in law is

fant can perform, must be done by him, and infancy, in such case, is no excuse (8).

(8) Whitting- cuse (8).

8 Rep. 44 b. 3 Bulftr. 59. Williams v. Fry, 2 Lev. 21. 1 Ventr. 199. 1 Ch. Ca. 138. Falkland v. Bertie, 2 Vern. 333. 343. Scott v. Haughton, 2 Vern. 560.

not founded on skill and considence, as where the infant or seme covert be lesse for life, and makes a seoffment in see, and the lessor enters for the forseiture; yet it shall not bar the infant or seme covert, after the death of her husband. But if an infant or seme covert commit waste, it shall bind the infant and seme covert, for the statute gives the action to recover the land; but if the condition be by force of a statute, which gives an entry, but no action, as in case of an alienation in mortmain, the infant, or seme covert is not barred by the entry for the condition broken. See also Co. Litt. 233. b.

SECTION VI.

As for feme coverts, the law is much the same, with respect to their power of contracting, as of infants (b); for they have

⁽b) The disability of infants to contract is in respect of the imbecility of their years. The disability of

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have no will, but the will of their hufbands (1); though, in the Roman law (2), it was otherwise (i). And in this, equity follows

(1) Co. Litt. 112 a. (2) Cod 12 1. Cod. 8. 56. 6 1 Domat. tit. 2. 6. 1. p. 18.

of married women proceeds upon the confideration, that if they were allowed to bind themselves, the law having vested their property in their husbands, they would be liable to engagements, without the means to answer them; and if they were allowed to bind their husbands, they might, by the abuse of such a power, involve their husbands and families in ruin. To guard against fuch confequences, the law confiders all acts of the wife, which might prejudice the interest of the husband, as void, unless in the case of debts contracted by the wife for necessaries, with which the husband is bound to supply her, and on failure of which she may contract, so as to bind him; but it seems, that at law the cannot borrow money to lay out in necessaries, but at the peril of the lender, who must lay it out for her. Earl v. Peale, Salk. 287. though, in equity, it is fufficient to charge the husband, if the money be actually applied to the purpose for which it was borrowed, though the lender neglect to fee to the application. Harris v. Lee, I P. Wms. 483. Pre. Ch. 502. A wife may, without her husband, execute a naked authority, whether given before or after marriage, Co. Litt. 112. a. Hargrave's ed. n. 6. Peacock v. Monk, 2 Vez. 191. Godolphin v. Godolphin, 1 Vez. 21. So where both an interest and an authority pass to the wife, if the authority be collateral to, and does not flow from, the interest; because then the two are as unconnected, as it they were vested in different persons. Gibbons v. Moulton, Finch's Rep. 346. And as a feme covert

follows the law (k). For the husband's goods are looked upon, with respect to the wife, as if they were in abeyance, or custody of the law, to be charged only

may, without her husband, convey lands, in mere execution of a power or authority, fo may she, with equal effect, in performance of a condition, where land is vested in her on condition to convey to others. And these acts she may do. W. Jones, 137, 138. upon the ground already stated, that her husband cannot be prejudiced by fuch acts, and prejudice might arise to others, if his concurrence should be essential. It feems doubtful, however, whether she can convey lands, which she holds as trustee, without her husband joining in fuch conveyance. Daniel v. Ubley, Sir William Jones, 138. And Mr. Hargrave thinks this distinction between a trust and a power or condition may be thus accounted for: " trufts being properly the subjects of confideration for courts of equity only, and though, in them, the legal estate is made subservient to the trust, yet courts of law take notice of trusts for very few purposes; nor will it be easy to find an authority for departing from any rule about the effect of legal conveyances, merely in respect of their being a performance of trufts." Hargrave's Co. Litt. 112. a. n. 6. Another reason for this distinction may be drawn from the consideration, that if a married woman were allowed to convey a trust estate, without her husband's concurrence, she might convey it, before the feveral objects of the trust were fatisfied, for which he might jointly with her be refponfible to the cestuys que trust: a reason, which does not apply to the mere execution of a power, or performance

by act of law. And if she elope (3), she loses the privilege of charging him even for necessaries (1), as at common law she lost her dower (4) (m). But it is certain,

(3) Morris
v. Martin,
Strange, 647.
Child v.
Hardyman,
Stra. 875.
(4) Co. Litt.
32. a. See alfo
Shute v. Shute,
Pre. Ch. 111.

formance of a condition; but which, extending to the case of a seme covert named executrix, led to the opinion, that she cannot, without the affent of her husband, take upon herself the execution of the will. Wentworth's Office of Executor, p. 202. cites 2 H. 7. 15. Thrustout v. Coppin, 2 Bla. Rep. 801. an opinion, upon which it might be difficult to proceed; as, in the spiritual court, she certainly might prove the will, and do all other acts respecting it, without the concurrence of her husband; and there is no instance of a prohibition being in fuch case granted, to restrain the proceedings in the spiritual court. But though the husband do affent to her acting as executrix, she cannot release her testator's debts; "for," says Wentworth, " if the wife's gift or release should stand good, her act might exceedingly endanger the husband, and make his goods liable to the creditors, the testator's estate being wasted by the gift or releases of the wife." Office of Executor, 206. And so it was held in Russel's case, 5 Rep. 27. But whatever doubt may exist as to the wife's right to probate from the ecclefiastical court without the confent of her husband, it seems that he may obtain it in her name without her confent, but in fuch case she will not be liable to a devastavit. Beynon v. Gollins, 2 Bro. Ch. Rep. 324. and after his death she may renounce. Ibid. In what particulars the disability of a married woman differs from that of an infant, fee 9 Vin. Ab. 407. (I. 3.)

tain, that a wife may have a feparate estate from her husband, as by agreement, before or after marriage (n); or by decree, for ill usage or alimony (n); or otherwife

- (i) Our ecclefiaftical courts proceeding in general according to the civil law, allow the wife to fue, and to be fued without her hufband; and will compel the husband to provide her with money for the purpose of any fuit which she may have instituted in their courts against him, but it feems that the husband may release whatever she recovers; for the marriage continues, and whatever accrues to the wife during coverture, belongs to the husband. Chamberlain v. Hewitson, Lord Raym. 79. 1 Salk. 115.
- (k) Though courts of equity recognize the rule of law, which confiders husband and wife as one person, and their interests as the same, yet there are cases, in which equity will treat their interests as distinct and feparate, and will allow the husband to fue the wife, Brooks v. Brooks, Pre. Ch. 24. Sir Richard Moore v. Lady Moore, I Atkyns's Rep. 272. or the wife to fet up claims adverse to those of her husband, and which The may profecute by a fuit, instituted in the name of her prochein amy, or next friend, Kirk v. Clark, Pre. Ch. 275. Lampert v. Lampert, 1 Vez. Jun. 21, as where any thing is given to the separate use of the wife. Griffith v. Hood, 2 Vez. 452; or the husband refuse to perform marriage articles, Oxenden v. Oxenden, 2 Vern. 493; or to perform articles for a separate maintenance, Angier v. Angier, Gilb. Rep. 152. and it is no answer to such suit, that the wife has been guilty even of adultery. Sidney v. Sidney, 3 P. Wms.

otherwise secured in trustees hands for her (o). And as to these, she is in nature of a seme sole (5), and may sue, or be sued, without her husband, (p); and they

(5) Gorges v. Chancey, Tothill, 97. 1 Chan. Ca. 118. Bletfow v. Sawyer,

1 Vern. 244. Allen v. Paffworth. 1 Vez. 163. Hearle v. Greenbank, 1 Vez. 298. Grigby v. Cox, Peacock v. Monk, 2 Vez. 190. Hulme v. Tenant, 1 Brown's Rep. 16.

Wms. 269. Blount v. Winter, 19th July 1781. in most cases, where the wife comes into equity to be supported in her possession independant of her husband, and separate from him, or is allowed to sue without him, it is her merit that intitles her to relief, P. Lord Hardwick, Hunt v. Hunt, MSS. 2d May 1739. and therefore the court will not decree maintenance, where there is full proof of elopement and adultery. P. Lord Hardwicke, Watkyns v. Watkyns, 2 Atk. 96. But fee Ball v. Montgomery, 4 Bro. Ch. Rep. 339; still lefs will equity affift her in any legal claim of a divorce for adultery. See Shute v. Shute, Pre. Ch. 111. But unless fuch impropriety be imputed and proved, equity will confult and provide for the claims of the wife; and with fuch view it may be laid down as a general rule, that courts of equity, confidering the husband bound in conscience to make a settlement upon his wife at least adequate to her fortune, will not part with her fortune, unless he do make a proper settlement, or the wife in court being apprifed of the amount of the fund. (Edwards v. Townshend, Anstr. 93.;) and there being proof of there having been no previous articles of fettlement, confent to his receiving it, or being abroad give her consent to commissioners. Bourdillon v. Adair, 3 Bro. Rep. 237. Ex parte Purvis 12th Jan. 1793. Shipton v. Hampson, Finch's Rep. 145. Milner v. Colmer,

(6) Fettiplace v. Gorge. 3 Bro. C. R. 8. Gore v. Knight, 2 Vern. 535. Pre. Ch. 255. are not in the power of her husband, but in her own disposal, and the produce of them (6), in nature of a will (q), and are liable to her debts (7). And if she has

Herbert v. Herbert, Pre. Ch. 44.
(7) Kenge v. Delaval, 1 Vern. 326. Norton v. Turville, 2 P. Wms. 144.

Colmer, 2 P. Wms. 639. Adams v. Pearce, 3 P. Wms. 12. Harrison v. Buckle. Stra. 238. Brown v. Elton, 3 P. Wms. 205. Attorney-General v. Whorewood, 1 Vez. 538. Sleech v. Thoringdon, 2 Vez. 560. And if he refuse to make such settlement, the court will order the interest to accumulate for the benefit of his wife, unless he is starving for want of maintenance. Bond v. Simmons, 3 Atk. 20. Atherton v. Noel, 18th March 1786. Armstrong v. Elveridge, 8th August 1791. And in ex parte Higham, 2 Vez. 579. Lord Hardwicke appears to have refused to order the whole of the wife's fortune to be paid to the husband, though the was in court, and defired it might. See also Blackwood v. Morris, cited Forrester, 43. to the same effect. But see Butler v. Duncombe, 2 Vern. 762. Dimmock v. Atkinson, 3 Bro. Ch. Rep. 195. Wright v. Rutter, 2 Vez. Jun. 677. And in Willetts v. Cay, 2 Atk. 67. the Master of the Rolls is reported to have ordered the wife's whole fortune to be paid to the husband, though insolvent, the wife being in court, and giving her confent.

It is material to observe, that this equity is personal to the wife; for if she die in the lifetime of her husband, though she leave children, her husband is entitled to her personal property, without making any provision for them, Scriven v. Tapley, Ambler's Rep. 509. So

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has a separate maintenance, (r), and lives separate; and this known to tradesmen, they cannot trust her, and recover of the husband

in Phipps v. Earl of Anglesea, MSS. 22d Nov. 1738, the fund being decreed to be fecured, for the benefit of the wife and her iffue, till the husband made a settlement, was held to be the absolute property of the wife, she having survived her husband, though there was iffue of the marriage; but it has been held, that though the wife furvive her husband, if a decree be actually made, and the fund be in court, though the court detain it, in order to enforce a provision for the wife, that upon the death of the wife without children, the husband's representatives are intitled to it, for it was absolutely vested in him by law. Packer v. Wyndham, Pre. Cha. 418. But see Wytham v. Cawthorn, 1 Eq. Ca. Ab. 392. pl. 1. contra. The circumstance of the wife being dead, without leaving children to be provided for, was certainly relied upon in Packer v. Wyndham; but it is observable, that in the case of Scriven v. Tapley, the children were held not to be within the equity, upon which the court interpofes in favour of the wife, lest it should be attended with ill confequences to creditors; for, fo anxious are courts of equity to affert this equity, that even the claims of creditors shall not prevail against it, Jewson v. Moulson, 2 Atk. 417. and if in confideration of the husband making a fettlement, the trustees have possessed him of his wife's fortune, equity will support the settlement though made after marriage and impeached by creditors, Moore v. Rycault, Pre. Ch. 22. Anon. Pre. Ch. 101. 520. Hinton VOL. I. v. Scott,

The

(8) Todd v. Stokes, 1 Salk. 116. Lord Raym. 444. Angier v. Angier, Pre. Ch. husband at law (8). Yet, while the marriage continues, the living separate does not destroy the legal rights of the husband (s).

499. Hatchett v. Baddeley, 2 Bla. Rep. 1079. Manby v. Scott, 1 Lev. 4. best reported in 1 Bacon's Ab. 295.

> v. Scott, Mosely 336. Middlecome v. Marlow, 2 Atk. Cappodoce v. Peckham, 4th May 1792. Ch. Dundas v. Dutens, 1 Vez. Jun. 196. equity shall also prevail against the assignees of the hufband, he being a bankrupt. Jacobson v. Williams, P. Wms. 382. Worrall v. Marlar, stated in a note in Mr. Cox's edition, I P. Wms. 459. Ofwald v. Probert, 2 Vez. Jun. 685. fo also against the husband's affignees for payment of debts, Prior v. Hill. 4 Bro. Ch. R. 130. and, in some late cases, it has been held by the Master of the Rolls against the authority of Povey v. Brown, Pre. Ch. 325. Gilb. Rep. 80. and the observation made by Lord C. Thurlow, in Worrall v. Marlar, that " he did not find it any where decided, that if the husband make an actual affignment by contract for a valuable confideration, that the affignee should be bound to make any provision for the wife out of the property affigned," that the affignee of the husband, though for a valuable confideration, must take subject to the equity of the wife, Pope v. Crashaw, 4 Bro. Ch. Rep. 326. See also Like v. Beresford, 3 Vez. Jun. 506. which case involved circumstances so peculiarly favorable to the claims of the affignee, the money being advanced for the maintenance of the husband and wife, that if any case could affect the general equity of the wife, the claims of the affignee must have prevailed.

The anxiety of courts of equity to protect the claim of the wife to an adequate fettlement out of her own property has induced them not only to enforce it, when the husband seeks their aid, but to restrain the husband from fuing, in the ecclefiaftical court, for the wife's portion arifing out of perfonal estate; because that court cannot enforce the equity of the wife. See Pre. Ch. 548. Jewson v. Moulson, 2 Atk. 420. Tanfield v. Davenport, Toth. 114. And upon the fame principle, courts of law have held that an action for a legacy will not lie, Dicks v. Strutt, 6 Term Rep. 600, and the hufband has been restrained from affigning the wife's property, Ellis v. Ellis, 7 March 1793. Ch. But, notwithstanding these determinations, it is faid, that courts of equity will not, in general, interpose in prejudice of the husband's legal right, if he can make fuch right available, without reforting to a court of equity. Milner v. Colmer, 2 P. Wms. 641. Attorney-General v. Whorewood, 1 Vez. 538. But see Pre. Ch. 548. Jewson v. Moulson, 2 Atk. 420. Tansield v. Davenport, Toth. 114.

It may be proper to observe, that though the husband, by the marriage, adopts the wise and her circumstances together, and is liable to her then debts, 3 Mod. 186. yet he is liable to them only during the coverture, unless the creditor recover judgment against him in the lifetime of the wise, Powell v. Bell, Pre. Chr 255. Sanderson v. Crouch, 2 Vern. 118. nor can a court of equity make him liable, in respect of the fortune which he may have had with her. Earl of Thomond v. Earl of Sussol, 1 P. Wms. 461. Heard v. Stamsord, 3 P. Wms. 410. Forrester, 173. but see Ball v. Smith, 2 Freem. 231. But if the husband

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take out administration, he will be, as administrator, liable to the extent of what he receives as her affets. Heard v. Stamford, Forrester, 172. Q. Whether the husband would, in such case, be liable, if he had made a fettlement of his own estate, in consideration of her fortune; it having been held, that by fuch fettlement, he must be considered as a purchaser of his wife's fortune, though the fame confift of merely choses in action? Cleland v. Cleland, Pre. Ch. 63. Meredith v. Wynn, Pre. Ch. 312. Finch's ed. and cases there cited, 3 P. Wms. 199. n. Blois v. Lady Hereford, 2 Vern. 502. See also Archer v. Pope, 2 Vez. 523. But in Salwey v. Salwey, Ambler's Rep. 692. it was held, that there must be an express agreement, to intitle the husband to the wife's choses in action, or chattels; and fo it feems to have been held in Heaton v. Haffell, M. 6 G. 1. Ch. 4 Vin. Ab. 40. tit. Baron and Feme D. in a note, and in Rudyard v. Neirin, Pre. Ch. 200. 2 Freem. 262. fee also Lister v. Lister, 2 Vern. 68.

(1) Sed qu. Whether notice to the tradefman trusting her for necessaries be not necessary, if she merely withdraw herself, and afterwards offer to return, and the husband resuse to receive her again? Child v. Hardyman, Stra. 875. In the case of Manby v. Scott, which is best reported in 1 Ba. Ab. 295. it is observable, that the husband had prohibited several persons to trust his wife, she having left him without his consent, and, amongst others, he had expressly prohibited the plaintist; on which the court held, that the presumption of the husband's consent to the contract, which, in many cases, may be implied, was wholly repelled. That the husband is not liable for necessaries

after adultery, see Gower v. Hancock, 6 Term Rep. 603.

It may be deserving of consideration, whether the husband having possessed himself of his wife's fortune, shall be discharged from her debts for necessaries, if it appear that she withdrew in consequence of his harsh and cruel conduct towards her. I am aware that it may be said, the spiritual court would, under such circumstances, decree her alimony; but there are considerations of delicacy which might control such an application, and it seems hard that fair creditors should suffer by the influence of such considerations.

- (m) But articles to fettle lands, being in nature of an actual jointure, are not forfeited by an elopement, &c. as is dower. Sydney v. Sydney, 3 P. Wms. 275. Blount v. Winter, 9 July 1781. cited in a note by Mr. Cox.
- (n) Sir William Blackstone, 1 Com. 442. observes, that it is generally true, that all compacts made between husband and wife, when fingle, are voided by the intermarriage, and refers to Cro. Car. 551. in which case it was agreed, that if a seme obligee take one of the obligors to husband, that it is a discharge to the other co-obligors. The reason of this decision is within the distinction, which ought to qualify the rule, for the debt was due at the time of the marriage, and being due, the husband might have paid it, but payment to his wife would be like transferring it from one hand to another; and, therefore, as the debt would exist during the coverture, if allowed to exist at all, the marriage shall, at law, extinguish the debt. Cage v. Acton, 1 Lord Raym. 515. But where the agreement be fuch as cannot create a debt, or raife a demand during the coverture,

coverture, the marriage shall not extinguish the agreement. Smith v. Stafford, Hob. 216. Clark v. Thompfon, Cro. Jac. 571. Tylley v. Pierce, Cro. Car. 376. Lady d'Arcy's case, 1 Ch. Ca. 21. and Pridgeon's case, 1 Ch. Ca. 117. in which the distinction is taken by Hale, Chief Baron. Melbourne v. Ewart, 5 Term Rep. 381. But though courts of equity admit a debt in . præfenti, or which might arife during the coverture, to be extinguished at law by the marriage, upon the notion, that husband and wife are but one person in law, and cannot fue each other, yet, as they may fue each other in equity, a bond, or other fecurity, though void at law, shall be sustained in equity at least, as evidence of an agreement, Cannel v. Buckle, 2 P. Wms. 243. Acton v. Pearce, 2 Vern. 480. Watkyns v. Watkyns, 2 Atk. 97. fee also Cotton v. Cotton, Pre. Ch. 41. And if a wife charge her estate with payment of her husband's debts, or apply her separate estate to such purpose, and it does not appear to have been intended by her as a gift to her husband, equity will decree the husband's affets to be applied in exoneration of her estate, or in repayment of the money advanced. Huntingdon v. Huntingdon, 2 Vern. 437. 1 Bro. P. C. 1. Pocock v. Lee, 2 Vern. 604. Tate v. Austin, 1 P. Wms. 264. 2 Vern. 689. Parteriche v. Pawlett, 2 Atk. 384. See also Clinton v. Hooper, 3 Bro. Ch. Rep. 201. Aftley v. E. of Tankerville, 3 Bro. Ch. Rep. 545.

As to agreements by the husband after marriage, by which the wife claims a feparate estate, it was formerly understood, that the wife must take through the medium of trustees, or others, and not immediately from her husband; for, unless by particular custom, as by the custom of York, (Fitz. Prescription, 61. Bro. Custom, 56.) a feme covert is incapable of taking any thing

thing of the gift of her husband, Co. Litt. 3. except by will, Littleton, f. 168. See also Moyse v. Gyles, 2 Vern. 385. Beard v. Beard, 3 Atk. 72. But in Lucas v. Lucas, I Atk. 270. Lord Hardwicke obferved, that, in equity, gifts between husband and wife had been often supported, though the law does not allow the property to pais; and in Pawlett v. Delavel, 2 Vez. 666. his lordship entered very particularly into the question and supported the transaction; but in Milnes v. Busk, 2 Vez. Jun. 498. Lord C. Loughborough is flated to have referred that determination to the particular circumstances of the case, and to have expressed a doubt whether a feme covert is to be confidered, in respect of her separate property, as a seme fole quoad her husband, in transactions between them. But fee Slanning v. Style, 3 P. Wms. 334. and Calmady v. Calmady, there cited. Bletfow v. Sawyer, I Vern. 245. Moore v. Freeman, Bunb. 205. Mitchell v. Mitchell, 15 and 18 July 1712. Exch. cited in Moore v. Freeman. See also Bell v. Hyde, Pre. Ch. 328. Gilb. Rep. 83. Pybus v. Smith, 3 Bro. Ch. Rep. 340. Ellis v. Atkinson, 3 Bro. Ch. Rep. 565. Carr v. Eastbrooke, Rolls. 2 May 1793. Wood v. Watham, 2 May 1793. The cases to which Lord Hardwicke feems to have adverted, as cases in which the court would not support such gifts, are where the allowance of them would prejudice creditors, Slanning v. Style; and where the gift is of the whole of the husband's estate. Beard v. Beard, 3 Atk. 72. But though the wife may take a separate estate from her husband, and even have a decree against her husband in respect of fuch estate, see Cecil v. Juxon, 1 Atk. 278. or avail herself of a charge for payment of his debts, Offley v. Offley, Pre. Ch. 26. yet it may be material to remark, that if she do not demand the produce during his lifetime.

time, and he maintains her, that an account of such feparate estate shall not be carried back beyond the year. Powell v. Hankey, 2 P. Wms. 82. Thomas v. Bennet, 2 P. Wms. 341. Fowler v. Fowler, 3 P. Wms. 355. Lord Townsend v. Wyndham, 2 Vez. 7. Peacock v. Monk, 2 Vez. 190. Blagrave v. Blagrave, Mich. Term 1789. Squire v. Dean, 4 Bro. C. R. 326. Smith v. Lord Camelford, 2 Vez. Jun. 716. This rule, however, proceeds on the notion of the wife's consent; if, therefore, she does, in her husband's lifetime, demand such account, and he promises to pay whatever is due to her, she shall be allowed to come upon her husband's estate, as a creditor, for the amount. Ridout v. Lewis, 1 Atk. 269. See also Countess of Warwick v. Edwards, 1 Eq. Ca. Ab. 140. pl. 7.

But though agreements after marriage bind the husband, yet their validity, as against creditors or purchasers, must depend upon the sufficiency of the consideration which led to them; for, if merely voluntary, and accompanied with any circumstances from which a fraudulent design may be inferred, they shall not be allowed to prevail against creditors, nor against purchasers. See c. 4. s. 12, 13. where the effect of voluntary conveyances is more fully considered, with reference to the statutes 13 and 27 Elizabeth.

(n) There certainly are cases in which the court of Chancery has decreed alimony to the wise; but, whether the decrees proceeded upon a previous divorce in the ecclesiastical court, or upon an agreement between the parties, in many of the cases, does not appear. Lasbrook v. Tyler, 1 Ch. Rep. 24. Ashton v. Ashton, 1 Ch. Rep. 87. Russell v. Bedwill, 1 Ch. Rep. 99. Whorewood v. Whorewood, 1 Ch. Rep. 118. 1 Ch. Ca. 250. But it is observable,

that

that all these cases, except Lasbrook v. Tyler, were during the time of the troubles, when commissioners were appointed, to whom jurisdiction was expressly given, and whose decrees were held to be confirmed by the act for the confirmation of judicial proceedings, 1 Ch. Rep. 118. In Nichols v. Danvers, 2 Vern. 761. proceedings had been had against the husband, (as appears from the register's book, though not noticed in Mr. Vernon's Report,) in the ecclefiaftical court, propter fævitiam; and in Oxenden v. Oxenden, 2 Vern. 493. it appears from Gilbert's Report of the fame case, that there had actually been a divorce, propter fævitiam; and in Angier v. Angier, Gilb. 152. there was an agreement. But in Williams v. Callow. 2 Vern. 752. the court certainly does appear to have decreed the wife a separate maintenance out of a trust fund, on account of the cruelty and ill-behaviour of the husband, though there was no evidence of a divorce, or agreement that the fund in dispute should be fo applied. And in Watkyns v. Watkyns, 2 Atk. 96. the husband having quitted the kingdom, Lord Hardwicke decreed the wife the interest of a trust fund till he should return, and maintain her as he ought. Yet, in Head v. Head, 3 Atk. 547. Lord Hardwicke observes, that he could find no decree to compel a husband to pay a separate maintenance to his wife, unless upon an agreement between them, and even then unwillingly; and this opinion of Lord Hardwicke appears most reconcileable with principle; for the case of a divorce, propter fævitiam, may be confidered as an implied agreement; and if there be an express or implied agreement, there feems no doubt, but that courts of equity may, concurrently with the spiritual court in proceeding upon it, decree a separate maintenance, Wood's Institute, 62. Sealing v. Crawley, 2 Vern. 386. Guth v. Guth, MSS. 24th May 1792. Hudson v. Hudson,

v. Hudson, 19 Nov. 1712. S. P. Stokes v. Stokes, Rolls. E. T. 1 Ann. The spiritual court, however, would be the more proper jurisdiction, if it acted in rem, Litt. Rep. 78. 2 Comyns's Dig. 100. 2 Atk. 511. But if, after an agreement between husband and wife to live feparate, they appear to have cohabited, equity will confider the agreement as waved by fuch fubfequent cohabitation, Fletcher v. Fletcher, MSS. M. 1788. or if the agreement being in consequence of the wife's elopement, the husband offer to take her again, Mildmay v. Mildmay, 1 Vern. 52. It is observable, that if courts of equity had an original and concurrent jurifdiction with the spiritual courts, it would have been unnecessary to have given the commissioners, during the troubles, fuch jurisdiction; and that the doubt which was entertained, 1 Ch. Rep. 118. could not have been raised, respecting the validity of their decrees, after the act confirming judicial proceedings. Besides, even in the spiritual court, they do not pretend to the right of decreeing alimony, but as incidental to a decree of divorce; and a decree of divorce or feparation was never even fuggested to be within the jurisdiction of a court of equity. Ball v. Montgomery, 2 Nez. Jun. 101.

(0) Though it has never been doubted, but that a married woman make take and enjoy an estate, separate from and independently of her husband, if trustees were interposed, yet it was formerly very much doubted, whether she could take an estate to her separate use, unless trustees were interposed, Harvey v. Harvey, 1 P. Wms. 126. Burton v. Pierpoint, 2 P. W ms. 79. But in Bennet v. Davis, 2 P. Wms. 316. it was held, that where one devised lands in see to his daughter, being a feme covert, for her separate use, without appointing any trustees, it should be a trust in the husband; for that there is no difference where

•a trust is created by act of the party, and where by act of law: and fo it was decreed in Rolfe v. Budder, Bunb. 187. Darly v. Darly, 3 Atk. 399. equity will not only raise a trust, where the object of the gift is to the separate use of the wife, but will also, from the nature of fome gifts, infer them to be to the feparate use of the wife, Graham v. Londonderry, 3 Atk. 393. See Lee v. Pricaux, 3 Bro. Rep. 381. That a feme covert may dispose of her separate estate, if personal, see Gore v. Knight, Pre. Ch. 255. Herbert v. Herbert, Pre. Ch. 44. Peacock v. Monk, 2 Vez. 191. Hearle v. Greenbank, 1 Vez. 303. Fettiplace v. Gorge, 3 Bro. C. R. 8. Hulme v. Tenant, 1 Bro. Ch. R. 16. See also Willatt v. Cay, 2 Atk. 16. and the cases referred to by Mr. Sanders in his edition of Atkyn's Reports. Whether a feme covert may dispose of her separate property in favour of her husband, by a donation inter vivos, fee Milnes v. Busk, 2 Vez. Jun. 498. and Whistler v. Newman, 4 Vez. Jun. 129. in which the cases upon the point are very ably observed upon. But it feems, if a woman, being possessed of a trust term to her separate use, should marry, that her interest therein, notwithstanding the trust, will vest in her husband jure mariti. Sir Edward Turner's case, 1 Vern. 7. Hunt, 1 Vernon, 18. Tudor v. Samyne, 2 Vern. 270. Bates v. Dandy, 2 Atk. 421. The authority of these cases is recognized by Lord Hardwicke, in Jewson v. Moulson, 2 Atk. 421. but it appears to be confiderably weakened by the decision in Lady Strathmore v. Bowes, 2 Bro. Ch. Rep. 345. that a woman may, before her marriage, and without the privity of her intended husband, convey her property to trustees for her separate use, and that, by such conveyance, it is placed beyond the reach and controul of her husband. " for that a man, who marries without a treaty, must be content to take his wife as he finds her."-It will not,

not, I trust, be considered a want of that respect, which is due to the high authorities who determined this case, to observe, that as it does not appear immediately reconcileable with the other cases and opinions in the books, (Carlton v. Earl of Dorset, 2 Vern. 17. Lance v. Norman, 2 Ch. Rep. 41. Howard v. Hooker, 2 Ch. Rep. 42. Poulson v. Wellington, 2 P. Wms. 533. King v. Cotton, 2 P. Wms. 674. Draper's case, 2 Freeman, 29.) the particularity of its circumstances might have in some degree occasioned the difference of decision.

(p) There are numberless cases, in which the wife has been allowed, through the medium of her prochein amy, to fue her husband, in respect of her separate property; but I have not been able to find any cafe, either at law or in equity, in which she has been allowed to fue a stranger, merely in respect of her separate property, without her husband being plaintiff or defendant: if the husband be an exile, or has abjured the realm, then, indeed, she may sue, and is liable to be fued, as a feme fole, both at law and in equity. Co. Litt. 133. a. Countess of Portland v. Prodgers, 2 Vern. 104. Deely v. Duchess of Mazarine, Salk. 116. Newsome v. Bowyer, 3 P. Wms. 37. though she have no feparate property. Nor am I aware of any cafe in which it has been held, that a feme covert, living with her husband, may be fued at law, as a feme fole, (except indeed by special custom,) in respect of her having a feparate property. In a court of equity, indeed, the may be proceeded against without her hufband, if he be not within the jurisdiction of the court, and may be decreed to make good engagements which the has entered into respecting such property, Norton v. Turvill, 2 P. Wms. 144. Bell v. Hyde, Pre. Ch. 328. Dubois v. Hole, 2 Vern. 613, but in such cafe,

case, the most the court can do, is to call forth her separate property in the hands of her trustees, and to direct the application of it; for the court cannot make a personal decree against a feme covert for the payment of a debt, Hulme v. Tenant, 1 Bro. Ch. Rep. 16. Standford v. Marshall, 2 Atk. 68. It may, however, be proper to observe, that in the D. of Bolton v. Williams. Lord Loughborough faid, that he should confider much before he would advance the remedy further against a man and woman than the law gives it, 2 Vez. Jun. 156. and in Whistler v. Newman, 4 Vez. Jun. 129. his lordship entered very fully into the confideration of the cases upon the subject, and concluded by observing, that though "where the creditor of the husband, or person dealing with the married woman, has got any legal hold of the fund, he must take it; yet if he has not any legal hold I am much at a loss for any principle upon which this court can make his fituation better, and improve a fecurity which the law will not acknowledge. How far the law has gone in these cases, it is not necessary for me to determine upon; in some of the cases I have felt a degree of doubt that I have not been able to remove; but it is going a great way further than any reason of justice, much more of equity, will warrant, to extend that beyond any legal right that may have been got by the aid of a court of equity." But fee ex parte Read, Sittings before Mich. T. 1798.

In some modern cases it has, however, been held, that at law the wife living separate from her husband by articles of separation, and having a separate maintenance from him, secured to her by deed, is, in respect thereof, to be considered as a seme sole, and, as such, may be sued without her husband, Lady Lanesborough's case, B. R. H. 23 G. 3. Barwell v. Brooks, B. R. H.

24 G. 3 Corbett v. Poelnitz, 1 Term. Rep. 5. It might be construed a want of that respect which is due to the high authority of those who decided the above cases, even to question the principles upon which they proceeded; an imputation to which I should seriously lament having subjected myself, by any observation in the course of this work. It does appear to me, however, to be material to observe, that neither of the above cases (though they are supposed to furnish at least a general rule of law,) adverts to the adequacy of the separate maintenance, nor to the circumstances of the husband at the time of securing it. As to the adequacy of the maintenance, it seems to be a material confideration; for, if the wife should, by the brutality or misconduct of her husband, or by collusion, be induced to accept of a fum not sufficient to maintain her. the might, by fuch acceptance, become chargeable to her parish: but the contracts of husband and wife shall not affect third persons, and the parish is interested in the husband's maintaining his wife. The decisions, however, are, that the hufband is discharged of his liability, and that she is as a feme sole; if so, it will follow. that though a wife may gain a fettlement, in right of her husband, her husband may be discharged of his legal liability to provide her with necessaries, if the will confent to accept an allowance, though insufficient for her support. See Lillia v. Airey, 1 Vez. Jun. 277. As to the circumstance of the husband's being indebted. at the time of the separation, it seems to be a point of confiderable importance; for unless courts of law are prepared to determine, that a man indebted may, to the prejudice of his creditors, make a fettlement on his wife, it must follow, that every settlement, or separate maintenance, made by a husband, in such circumstances, is liable to be fet aside by the claim of creditors; fo that

the maintenance, in respect of which the wife is, according to fuch decifions, made personally liable, may be taken away by the subsequent claim of her husband's creditors. I am aware, that in the case of Stephens v. Olive, 2 Brown's Ch. Rep. 90. the creditors of the husband having instituted a fuit to set aside such a settlement, the Master of the Rolls held, that the covenant by the trustees to indemnify the husband against the wife's debts, was a valuable confideration; and, therefore, that the fettlement, though made after the debt to the plaintiff was contracted, was good against him: and Lord Loughborough, in King v. Brewer, Chelmsford Affizes, decided to the fame effect. To this clause, therefore, in general, may be referred the validity of the fettlement against the claims of creditors; (I fay in general, for it has been faid, that even without fuch claufe, the hufband is discharged from the debts of the wife, if he can shew that he allows her a feparate provision; and that the only material reason to introduce it is, that the husband may be protected against the costs which he may incur by being fued for fuch debts, Angier v. Angier, Gilb. Rep. 152.) But if the force and operation of this clause be as laid down in Stephens v. Olive, it would follow, that any agreement between husband and wife, fecuring her a separate maintenance, without such clause, might be fet afide by creditors; unless it could be shewn, that the conduct of the husband had been so harsh and cruel, as to afford the wife a fufficient ground for a fentence of alimony in the spiritual court, if the wife had fued him in fuch court; under which circumstances, it feems, a court of equity will fustain a conveyance by the husband of part of his estate, as a separate maintenance for his wife, even against the claims

claims of creditors; fee Hobbs v. Hull, MSS. July 1786.

As to wills of personal estate by seme covert, see Ross v. Ewer, 3 Atk. 160. Henley v. Philips, 2 Atk. 48. See Lockett v. Wray, Bro. or Vez.

(9) Lord Hardwicke, in Peacock v. Monk, 2 Vez. 191. feems to have thought, that this power of a feme covert over her separate estate must be confined to fuch part of it as was personal; for that of her real estate she could make no disposition during her coverture, unless by fine, or unless she had, before marriage, referved to herfelf fuch right by way of trust, or of a power over an use; and doubted, whether a court of equity could carry into execution a bare agreement, to the prejudice of the heir at law. Upon which Lord Kenyon observes, in Doe v. Staple, 2 Term Reports, 684. that "what was then confidered as a doubt, no longer remains so; for in Wright v. Cadogan, 6 Brown's P. C. 156. it was determined, that a court of equity would compel the heir to make a conveyance to the party, in whose favour fuch an agreement was made." See Rippon v. Dawding, Ambler's Rep. 565. And in all those cases, in which a feme covert has fuch power, she may exercise it without joining her trustees, unless their joining is made necessary, Grigby v. Cox, 1 Vez. 517. But if a power to dispose of her separate property by will, referved to her by agreement, be by her executed before marriage, the marriage being a revocation of her will, her disposition of it cannot take effect, Hodesden v. Lloyd, 2 Bro. Ch. Rep. 534. But where a feme covert is empowered to make a writing, in nature of a will, a writing executed during the coverture will operate as such, Cotter v. Layer, 2 P. Wms. 624. Oke v. Heath, 1 Vez. 139. Duke

of Marlborough v. Lord Godolphin, 2 Vez. 75. Southby v. Stonehouse, 2 Vez. 612. See Ross v. Ewer, 3 Atk. 160. Henly v. Phillips, 2 Atk. 48. Socket v. Wray, 4 Bro. Ch. Rep. 483. The power of femes coverts, under some circumstances, over their separate property, is thought, however, to have received an additional extent by the decision of the court of Common Pleas, in Compton v. Collinson, I Blackstone's Term Reports, Cases in C. P. 334. by which it was held, that a wife, having a copyhold estate to her separate use, and living feparate from her husband, may furrender the same without her husband, the husband having, upon the feparation, covenanted to join in all necessary conveyances of fuch estates, and to such uses as she should appoint. The power, in this case, certainly does not in terms enable her to dispose of the estate in any manner without her husband; but the husband's covenant is, that he will give effect to her appointment by joining in the neceffary conveyances, and the court conceived his joining in the furrender was requifite, merely to support his interest in her estate.

(r) In the case of Todd v. Stokes, the husband appears to have allowed his wife a separate maintenance; yet the court did not, in their decision, proceed upon that circumstance, but upon the general reputation of the husband and wise being separated; from which it might be inferred, that if that circumstance had not made a part of the case, the other circumstance singly would not have been sufficient to discharge the husband. In the report of Todd v. Stokes, it is noted, that Holt, Chief Justice, had, at Exeter Lent Assizes, 10 W. 3. in a cause between Longworthy v. Hockmore, (the authority of which is recognized in Thompson v. Hervey, 4 Burr. 2177.) held, that if a Vol. I.

husband turn away his wife, and afterwards she takes up necessaries upon credit of a tradesman, the husband shall be liable to the tradesman to pay for them. But if the wife elopes, though the tradefman has no notice of the elopement, if he give credit to the wife, the husband is not liable. Upon which it may be remarked, that the wife might, in fuch case, have become chargeable to her parish, her husband being, by her elopement, discharged even from his liability to supply her with necessaries; but it is observable, that the husband, in fuch case, is not discharged by his own act or agreement, but by the wife's misconduct; which is not the fact, where the discharge is in consequence of the husband's and wife's agreeing to live feparate, in confideration of a separate maintenance secured to the wife. Where the husband is discharged from liability to his wife's debts, in respect of her having a separate maintenance, it feems, that it must be a provision proceeding from himself, and not from a third person, Thompson v. Harvey, 4 Burr. 2177.

(s) This opinion feems to be recognized in Palmer v. Trevor, 1 Vern. 261. the court, in that case, holding, that payment to a wife of a legacy was not good payment, though the wife lived separate from her hufband; and, in Roll's Ab. 343. pl. 8. it is expressly laid down, that if husband and wife are divorced a mensa et thoro, and a legacy is left to her, the husband may release it, for such divorce does not dissolve the marriage. See also 2 Roll's Ab. 301. pl. 11. Stephens v. Totty, Cro. Eliz. 908. But in an anonymous case, 9 Mod. 43. the husband, though divorced a mensa et thoro, and though the wife had alimony, was restrained by injunction from felling a term which belonged to the wife. And in Newfome v. Bowyer, 3 P. Wms. 37.

it was held, that the husband being attainted of felony, and pardoned on condition of transportation, and the wife becoming afterwards intitled to some personal estate, as orphan to a freeman of London, that it belonged to her, as a seme sole. As to the interest vested in the husband by the marriage, in the wise's real and personal estates, see I Inst. 299. b. 300. a. 351, 352, 353. note (1). Hargrave's edition.

SECTION VII.

Grotius de Jure Belli et Pacis, b. 2. c. 11. f. 6.

A NOTHER impediment of affent is ignorance and error, (t) either in fact or in law (v). And if the mistake be discovered, before any step is taken towards

(1) Non videntur qui errant confentire is a general rule in the civil law; but, in its application, it is material to distinguish between error in circumstances which do not influence the contract and error in circumstances which induce the contract. This distinction is very fully considered by Pothier Traite des Obligations, par. 1. e. 1. s. 1. art. 3. s. 1. a work to which I am happy to refer, it appearing to me to afford the best illustration of the principles and conditions of contracts.

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towards performance, it is but just that he should have liberty to retract, at least, by satisfying the other of the damage that he

See also Burlamaqui Principes du Droit naturel, c. 1. f. 12.

(v) There certainly are cases, in which the ignorance of any particular fact will be a ground of relief, even at law, Doctor and Student, Dia. 2. c. 47. As where money is paid by mistake, Buller's Ni. Pri. 131. 4to ed. unless it be paid into court under a rule of court, Malcolm v. Fullarton, 2 Term Rep. 648. Marriott v. Hampton, 7 Term Rep. 269. But it must not be understood, that every kind of mistake is relievable in equity; for though equity will relieve against a plain mistake or misapprehension, as in Luxford's case, cited in Gee v. Spencer, 1 Vern. 32. 18 Vin. Ab. 370. Milmay v. Hungerford, 2 Vern. 243. Bingham v. Bingham, I Vez. 126. Cocking v. Pratt, I Vez. 400. Pooley v. Ray, 1 P. Wms. 355. or against ignorance of title, as in Tucker v. Searle, 2 Ch. Rep. 91. v. Turner, 2 Ch. Rep. 81. Evans v. Llewellyn, 2 Brown's Ch. Rep. 150.: yet equity will not interpose, if the fact was, from its nature, doubtful, or, at the time of the agreement, equally unknown to both parties, as in the case referred to by Lord Thurlow, in Mortimer v. Gapper, 1 Brown's Rep. 158. "a contract for a piece of ground, which was to be inclosed for 201. and upon a bill for specific performance, the defence was, that it was worth 2001, and although the contract was to be performed in futuro, yet, neither party knowing the value, the Master of the Rolls decreed the performance." Or, if there has been a long acquiescence under

he has sustained by losing the bargain. But if the contract be wholly, or in part, performed, and no compensation can be given him, then it is absolutely binding,

not-

under the mistake, and neither party aware of it, Nichols v. Leefon, 3 Atk. 573. Vaughan v. Thomas, I Bro. 556. Neither will equity avoid an agreement entered into to prevent family difputes, though founded on mistake, Frank v. Frank, 1 Ch. Ca. 84.; nor an agreement entered into to fave the honour of the family, Stapleton v. Stapleton, 1 Atk. 10.; nor will equity decree a forfeiture after an agreement, in which, if there be any mistake, it was the mistake of all the parties to it, Pullen v. Ready, 2 Atk. 592. Malden v. Merril, 2 Atk. 8. This doctrine is carried to a very confiderable extent, in a case referred to in a note to East v. Thornbury, 3 P. Wins. 127. by which it feems to have been held, that a tenant who had paid an annuity charged on land, without deducting the proportion of the taxes to which fuch annuity was liable, and which the tenant had paid, could not recover back the fame by a bill in equity. See Bingham v. Bingham, 1 Vez. 126. As to mistakes in framing deeds, they will be confidered c. g. f. 11.: it may, therefore, be fufficient, in this place, to observe, that they are relievable only in those cases, in which express evidence can be adduced of the intention of the parties, Henkle v. Royal Exchange Affurance, 1 Vez. 317. Langley v. Brown, 2 Atk. 203. Burt v. Barlow, 3 Bro. Ch. Rep. 451. Smith v. Maitland, 1 Vez. Jun. 362. Seymour v. Fotherly, 1 Vern. 320. As to mistakes in wills, fee Milner v. Milner, 1 Vez. 106. Hampshire v. Pearce.

notwithstanding the error (u). Yet this is not to be understood, where there proves

v. Pearce, 2 Vez. 216. Bradwin v. Harpur, Ambl. 374. Dowfett v. Sweet, Amb. 175. Ulrich v. Lichfield, 2 Atk. 372. Del Mare v. Rebello, 3 Bro. Ch. Rep. 446. Mellish v. Mellish, 4 Vez. 47. Philips v. Chamberlayne, 4 Vez. 51. Campbell v. French, 3 Vez. 321. which cases fully establish the general rule, that, in the construction of wills, the apparent intention of the testor shall not only controul any expression inconfistent with it, but correct any mistake by which it would be endangered; for mistakes ought never to be prefumed, if any construction agreeable to reason can be found out, Purse v. Snaplin, I Atk. 415. As to latent ambiguities, and how far parol evidence is admissible to explain them, see Lord Bacon's Rules, R. 23. Fonnereau v. Poyntz, I Bro. Ch. Rep. 472. and the cases there cited. Dowsett v. Sweet, Amb. 175. Bradwin v. Harpur, Amb. 374. Stebbing v. Walkey, 2 Bro. Ch. Rep. 85. and Spink v. Lewis, 3 Bro. Ch. Rep. 355. As to ignorance of law, it may be laid down as a general proposition, that it shall not affect agreements, nor excuse from the legal consequences of particular acts, even in courts of equity; as, if two are bound to another, and the obligee release the one, not supposing that he thereby discharged the other, yet, as ignorantia juris non excufat, he could not be relieved thereupon in equity. Harman v. Camm, 4 Vin. Ab. 387. pl. 3. but fee Simpson v. Vaughan, 2 Atk. 33. and Lansdown v. Lansdown, Moseley, 364. in which case it is said that this maxim of law, though it applies in criminal cases, does not hold in civil cases.

proves to be an error in the thing or subject for which he bargained; for then the business is null in itself, by the general rules of contracting, inasmuch as in all bargains, the matter about which they are concerned, and all the qualities of it, ought to be clearly understood, and without such distinct knowledge, the parties cannot be supposed to yield a full consent (x).

I have already observed, that equity will open settled accounts for error or fraud, and that errors of law in such accounts may, when opened, be corrected.

- (u) Beverley v. Beverley, 2 Vernon, 131, feems to have been decided on this ground; for, in that cafe, the release obtained by the son was not only founded in mistake, but was also fraudulent; yet, as it was the inducement to the son's marriage, the mother was held bound by it, Teasdale v. Teasdale, Sel. Ca. Ch. 59. S. P. but see Dyer v. Dyer, 2 Ch. Ca. 108.
- (x) The writers upon natural law maintain, that an error about a thing, or about its quality, upon profpect of which a man is induced to come to any agreement, renders the agreement or bargain void; for in such case, a man is not conceived to have agreed absolutely, but upon supposal of the presence of such a thing or quality, on which, as on a necessary condition, his consent was sounded, and therefore, the thing or quality not appearing, the consent is understood to be null and ineffectual, Pussendors's Law of Nature and Nations, b. 1. c. 3. s. 12.; and the civil law seems, upon

this principle, to have required the feller, in some cases, to declare the defects of the things fold, Dig. lib. 21. tit. 1. 1. 1. f. 1. Domat's Civil Law, book 1. tit. 2. f. 11. See Cicero de Officiis, lib. 3. c. 12, 13, 14. where this matter is very elaborately discussed. See also Heineccius Elem. J. N. and G. c. 13. f. 351. c. 14. f. 393. But the general rule of the common law of England is caveat emptor, upon which rule, it feems, that the vendor, without an express warranty, merely undertakes to make a good title to the vendee: to shew, that the goods delivered are fuch as were contracted for, and that no deceit was practifed to difguife their defects; and if provisions, that they were wholesome at the time of the delivery, 3 Bla. Com. 164, 165. If the warranty be express, an action will lie upon it to recover damages, unless the defect was apparent, and fuch as a common purchaser might have discovered at the time of the fale, ibid. It may be proper, however, to observe, that it is not every affirmation on the part of the vendor, that will amount to a warranty; for though falfely affirming the goods to be his own, he being in possession of them, when they were the goods of another, will subject the vendor to an action upon the case, without charging him with knowingly having fo falfely affirmed, Crosse v. Gardner, Carthew, 90. Medina v. Stoughton, 1 Salk. 210. yet if he affirm falfely of his right, when another has the possession of the subject, an action will not lie. Rofwell v. Vaughan, Cro. Jac. 196. Salk. 210, 211.; neither will an action lie upon a mere affirmation, if the vendor knew not of the defect at the time of the fale, I Comyns's Dig. 184.; or that the quality of the thing was different from what he affirmed, Chandler v. Lopus, Cro. Jac. 4. See c. 5. f. 8. note (g), note (h). It may, however, upon this point, be material to confider, whether the vendor of an article, in which he

is a dealer, does not impliedly warrant the quality of the article to be fuited to its general purpofes. See Pothier Traite des Oblig. par. 1. c. 2. ant. f. 163.

SECTION VIII.

MUCH more ought a mistake to render a pact or agreement invalid, where accompanied with fraud and circumvention, if it were occasioned by one of the parties, who, by that means, drew the other into the engagement (1); for then he is undoubtedly bound to make restitu- c. 14. f. 394. tion for the injury (y). Yet the rigour of the

(1) Heineccius Elen. J. N. &G.

(y) For this species of injury, an action upon the case for the deceit will lie at law, Buller's Ni. Pri. 30. and, in equity, the fraud may be affigned as a reason for not completing fuch contracts as are executory, or for rescinding such as are executed, Preston and Executors v. Wasey, Pre. Ch. 76. Young v. Clark, Pre. Ch. 538. Hick v. Phillips, Pre. Ch. 575. Mr. Wentworth's cafe, 1 Freem. 302. Jervis v. Duke, 1 Vernon, 20. Whorewood v. Simpson, 2 Vernon, 186. Broderick v. Broderick, 1 P.Wms. 239. Can v. Can, 1 P.Wms. 727. Lanfdown v. Lanfdown, Moseley, 364. Crull v. Dodson, 5 Vin. Ab. 507, 508. Savage v. Taythe common law would admit no averment by a man against his own deed (z), except

lor, Forrester, 236. Buxton v. Lister, 3 Atk. 383. Brereton v. Cooper, 2 Bro. P. C. 535. Shirley v. Stratton, 1 Brown's Rep. 440. Fox v. Macreth, 2 Brown's Rep. 400.

(z) Though it may be true, as a general proposition, that the common law will not allow of averments of matter dehors a deed, yet it is certainly not to be adopted as an universal proposition; for there are numberless cases, even at law, in which a deed has been defeated by matter in pais; as where the confideration was usurious, Bush v. Buckingham, 2 Ventris, 80.; or fimoniacal; or for compounding a felony, Jones's case, 1 Leon. 203.; or for suppressing evidence on a criminal profecution, Collins v. Blantern, 2 Wilson, 341.; or for the fale of an office, Fitzgibbon, 45.; or money won at play, Pope v. St. Leger, 5 Mod. 3.; or the defendant may go into evidence, to shew the real confideration to have been greater than that stated in the deed, Rex v. Inhabitants of Scammorden, 3 Term Rep. p. 474.; and it is faid, that fraud or covin may be averred against any act whatsoever, Jenk. 254. pl. 45. But, in general, relief against deeds obtained by fraud or covin is fought in equity, vide ante, fection 3. note (c). And equity will not only allow averments against the confideration, but will also admit parol evidence, to shew that the deed is framed upon a misconception of the intention of the parties, Baker v. Paine, IVez. 456, Eden v. Earl of Bute, 7 Brown's P. C. 204. 445. Jones v. Statham, 3 Atk. 388. Countels of Shelburne v. Earl of Inchiquin, 1 Bro. Rep. 328.; or that it varies

except in the king's case, who had savour shewn to him, because the public interest was bound up with his. But it is a constant rule in equity, that where there is either suppression veri, or suggestion falsi, the release, or other deed, shall be avoided (1). As if a man should be informed by J. S. that J. N. wanted to be a purchaser, and the latter should declare, that J. N. should have a better pennyworth than another person; and upon this, he should article with J. S. for the sale of it, when this purchase was, in reality, for a stranger; equity would not carry such a contract into execution (a); though, with-

(1) Jarvis v.
Duke, 1Veru.
20.
Broderick v.
Broderick, 1 P.
Wms. 240.
Kirwan v.
Blake, 13 Vm.
Ab. 552 pl. 9.
1 Freem. p.302.
c. 306.

ries from the heads or articles, see c. 3. s. 11. Simpfon v. Vaughan, 2 Atk. 33. Sander's Ed. and cases there cited, note (1). but see Rich v. Jackson; 4 Bro. Ch. Rep. 514.

(a) In the case of Lord Irnham v. Child, I Bro. Ch. Rep. 95. Lord Chancellor Thurlow is reported to have said, that he should be forry to lay it down, that "a man treating with a third person in trust for a second, whom he had resused to deal with, could, therefore, set the contract aside: no case has gone so far. Philips v. Duke of Bucks was upon a difference of price." It is certainly true, that the price, in Philips v. Duke of Bucks, was materially affected by the notion, that the vendor was treating with a person whom

out

(2) Philips v.
D. of Bucks,
1 Vernon, 227.
Twining v.
Morrice, 2 Brb.
Rep. 226.
(3) Gee v. Spencer, 1 Vern. 32.
Mildmay v.
Hungerford,
2 Vern. 243.

out doubt, J. N. might have fold it to I. S. the next day (2): and even a mifapprehension of the party has been held a ground for this purpose (3). But it is not every furprise that will avoid a deed duly made; nor is it fitting; for it would occasion great uncertainty, and it would be impossible to fix what was meant by furprise; for a man may be said to be surprised in every action, which is not done with fo much discretion as it ought to be. But the furprise here intended, must be accompanied with fraud and circumvention, and then it must be proved; for fraud is a thing odious in law (4), and never to be prefumed (b). And if the fraud

(4) Bath and Montague's cafe 3 Ch. Ca. 85. Grounds and Rudiments of Law and Equity, 125.

he wished to serve; but still it seems, that the principle upon which the court went, was, that there had not been that good faith and open dealing, on the part of the plaintist, which was requisite to sustain his claim to the extraordinary interference of the court. And the case of Eyre v. Popham, stated by Mr. Brown, in a note to his report of the above case of Lord Irnham v. Child, seems to have proceeded on the same principle. But the distinction stated by Lord C. Thurlow is a found distinction, see Poth, p. I. c. 1. s. I. art. 3, f. 1, 19.

(b) In Chestersied v. Janssen, 2 Vez. 155. Lord Hardwicke enumerates sour species of fraud: 1st, Fraud

fraud proceed altogether from a stranger, we are left to our remedy against him (c); and it is to be looked upon, as to the parties, as a mistake or error only, and to be governed by the rules before laid down.

Fraud arifing from facts and circumstances of impofition, which is the plainest case: 2dly, Fraud may be apparent, from the intrinsic value and subject of the bargain itself, such as no man in his senses, and not under delufion, would make on the one hand, and as no honest or fair man would accept on the other; which are inequitable and unconscionable bargains, and of fuch, even the common law has taken notice: a third is that which may be prefumed, from the circumstances and condition of the parties contracting; and this goes farther than the rule of law; which is, that fraud must be proved, not prefumed: but it is wifely established in this court, to prevent taking surreptitious advantage of the weakness or necessity of another, which, knowingly to do, is equally against conscience, as to take advantage of his ignorance: a fourth kind of fraud, his Lordship observes, may be collected or enforced, in the confideration of a court of equity, from the nature and circumflances of the transaction, as being an imposition, and deceit on the other persons, not parties to the fraudulent agreement.

(c) In such case, an action may be maintained at law, for the damage which the party has sustained by the misrepresentation or deceit, Passey v. Freeman, 3 Term Rep. 51.

SECTION IX.

(1) Grotius de Jure Belli et Pacis, l. 2. c. 12. f. 8. g. Puff. L. of Nature and Nations, b. 5. c. 3. f. 1. Pothier Traite des Oblig. par. z. c. i. art. 3. f. 4.

RUT further; in all contracts purely chargeable (1), if there appear to be an inequality, although there was no deceit, and all the faults of the thing were exposed, yet, if the damage be considerable, the bargain ought to be made void. And this estimate of the damage is to be taken either from the exorbitance of the price (d), or the poverty of the party injured;

(d) I have not been able to find a fingle case, in which it has been held, that mere inadequacy of price is a ground for the court to annul an agreement, though executory, if the fame appear to have been fairly entered into, and understood by the parties, and capable of being specifically performed; still less does it appear to have been confidered as a ground for rescinding an agreement actually executed. In the case of Keen v. Stukely, Gilb. Rep. 155. the court expressly held, that the exorbitancy of the price was not fufficient to discharge the defendant from the performance of his contract: the decree for a specific performance was, indeed, afterwards reverfed, but not upon the ground of inadequacy of confideration, but because the plaintiff had not made out his title by the time stipulated, 2 Bro. P. C. 396. In Willis v. Ternegan, 2 Atk. 251. Lord Hardwicke held, that " it is not fufficient to fet afide an agreement in equity, to fuggest weakness and indiferction in one of the parties who has engaged in it;

jured (e); for no man should be a gainer by another's loss; but a small damage, even

it; for, supposing it to be, in fact, a very hard and unconscionable bargain, if a person will enter into it with his eyes open, equity will not relieve him upon this footing, unless he can shew fraud." See also Hobart v. Hobart, 2 Ch. Ca. 159. Floyer v. Sherrard, Ambler's Rep. p. 18. In Gwynne v. Heaton, 1 Bro. Ch. Rep. g. Lord Thurlow observes, that " to set aside a conveyance, there must be an inequality so strong, gross, and manifest, that it must be impossible to state it to a man of common fense, without producing an exclamation at the inequality of it." And in Spratley v. Griffith, 2 Brown's Ch. Rep. 179. in a note to Heathcote v. Paignon, the Chief Baron affigned, as a ground for the decree, that there was "no case, in which mere inadequacy of price, independent of other circumstances, had been held fufficient to fet afide a contract." See alfo Stephens v. Bateman, 1 Bro. Ch. Rep. 22. Henley v. Acton, 2 Bro. Ch. R. 17. In addition to this concurrence of authority, a very firong argument in support of the rule may be drawn from those cases, in which losing bargains have been actually established and decreed, City of London v. Richmond, et. al. 2 Vern. 423. Wood v. Fenwick, 1 Eq. Ca. Ab. 170. Nichols v. Gould, 2 Vez. 422. and the case referred to by Lord Chancellor Thurlow, in Mortimer v. Capper, 1 Bro. Ch. Rep. 158. See also Domat's Civil Law, b. I. tit. 2. f. 3.

(e) But though courts of equity will not relieve against agreements, merely on the ground of the confideration being inadequate; yet, if there be "fuch inadequacy,

even in the law of nature, is not fufficient to break off a bargain, for the benefit of traffic, and the ease of the magistrate (2).

b. 1. tit, 2. f. 9. note (d).

inadequacy, as to shew that the person did not understand the bargain he made, or was so oppressed, that he was glad to make it, knowing its inadequacy, it will shew a command over him, which may amount to a fraud." P. Lord Thurlow, Heathcote v. Paignon, 2 Bro. Ch. Rep. 175. and such appears to be the nature of the third species of fraud enumerated by Lord Hardwicke, in Chestersield v. Janssen, 2 Vez. 155. and upon which the court seems to have proceeded, in Clarkson v. Hanway, 2 P.Wms. 203. Herne v. Meers, as stated in Mr. Brown's note, 2d vol. Ch. Rep. 176, 177. Gartside v. Isherwood, 1 Bro. Ch. Rep. 558.

SECTION X.

THE civil law fixed this at half the value of the highest price the thing was really worth (f), to be fold at the time

'(f) This rule of the civil law seems, however, to have been confined to immoveables, Domat's Civil Law, b. 1. tit. 2. s. g. 1. The same writer assigns a reason

time of the contract (1); and some have wished the law so in England (2). But although the court of Chancery have no fixed rule, how many years purchase is a reasonable price of lands, because the iniquity of the bargain does not depend upon the price (g); for what may be a reasonable price in one case, may be unreasonable in another; yet it is a constant rule, that where the bargain is plainly iniquitous, and it is against conscience to insist upon it, as forty years purchase for lands, or an extravagant price for stock, as was given in the South-Sea year; equity can-

(1) Cod. lib. 4. tit. 44. l. 2. 8. (2) Nott v. Hill, 2 Ch. Ca. 120.

reason for the rule being so applied; that though "the principal engagement which the buyer is under to the seller, is that of humanity, and the law of nature, which obliges him not to take advantage of the necessitous condition of the seller, to buy the thing at too low a price; yet, because of the difficulties of fixing the just price of things, and of the inconveniences, which would be too many, and too great, if all sales were annulled, in which the things were not sold at their just value, the laws connive at the injustice of buyers, with respect to the price of sales, except in the sale of lands, where the price given for them is less than the half of their just value." B. 1. tit. 2. f. 3.

(g) That mere inadequacy of price is not a fufficient ground to annul a contract, by this paffage is admitted; and the reason very correctly assigned.

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not support it, for that would be to decree iniquity (b). So a release of an equity

(b) The cases referred to by our author are, Keen v. Stukeley, before cited, and Cudd v. Rutter, I P. Wms. 570. Capper v. Harris, Bunb. 135. but neither of these appear apposite to his purpose; for the reverfal of the decree by the House of Lords, in Keen v. Stukeley, was upon a ground diffinct from the queftion of fraud; and in Cudd v. Rutter, and in Capper v. Harris, the reason assigned, why the court ought not to interpole, was, that it was a case more proper for an action for damages, with which, if the plaintiff pleafed, he might purchase stock, than for a decree for a specific performance, which might, from the nature of stock, be beneficial to the plaintiff one day, and prejudicial the next: see 5 Vin. Ab. 540. where the case is much more fully stated than in Peere Williams: fee also Dorison v. Westbrook, 5Vin. Ab. 540. pl. 22. It may, however, be proper to observe, that in Thomfon v. Harcourt, 2 Bro. P. C. 415. and Gardner v. Pullen, 2 Vern. 394. where fuch a contract was decreed; the party who had undertaken to transfer the flock was plaintiff, feeking relief against a penalty, in which he had bound himself for performance of his contract, and that a performance of it was the only ground upon which equity could relieve him. It is, however, certainly true, that courts of equity having "a diferetionary power to carry contracts into execution, if it appears they are unfairly obtained, though not to fuch a degree as to fet them afide, will not decree a performance, but will leave the plaintiff to his remedy at law." Savage v. Taylor, Forrester, 236.

ty of redemption has been fet aside, the court being fatisfied, upon the proofs, that the value of the land was much greater than to make a fatisfaction for the debts for which it was given (3).

(3) Kirwan v. Blake, 13 Vin. Ab. 552.

Young v. Clark, Pre. Ch. 538. Barnardifton v. Lingood, Barnard. Ch. Rep. 341. Vaughan v. Thomas, 1 Bro. Ch. Rep. 556. See also Buxston v. Lister, 3 Atk. 383.

SECTION XI.

RUT this rule feems to extend chiefly to fuch things as have fome flated and fettled price, for, in other cases, there is no reason; but as a beneficial bargain will be decreed in equity, fo, if it happens to be a losing bargain (i), it ought to be equally decreed (1). As, if a man take a (1) City of Lonlease of water-works, in order to let it out in shares, and make a profit of it, the

don v. Richmond and others 2Vern. 423. Wood v. Fen. wick, 1 Eq. Ca. Ab. 170. Nicholls v. Gould, 2Vez. 422.

(i) Unless fraud be imputable. Deane v. Roston. Anstr. Rep. 64.

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affignee,

affignee, in trust for those who bought shares, shall be compelled to pay the referved rent, though it be above double the value of what it proves to be worth; for the contract is to be judged of as matters flood when it took effect. And so hazardous bargains, to be paid double or treble the value of what is at prefent advanced, after the death of the tenant for life, but if fuch tenant for life outlives the person to whom the money is lent, then the whole to be loft, are not to be fet aside without circumstances (2); for there may be nothing ill in those bargains, the price, at the time, being the full value (3). And what after happens, as the death of the party, upon whose death the estate was to fall, or the money to be paid, cannot make any difference (i).

(2) Chefterfield v. Janfen, 1 Atk. 339. Batty v. Lloyd, 1 Vern. 141. Small v. Firzwilliam, Pre. Cn. 102.

(3) Cafs v. Rudell, 2 Vern. 280 White v. Nutt, 1 P. Wms. 61. Ex parte Manning, 2 P. Wms.

ning, 2 P. Wms. 410. Mortimer v. Capper, 1 Brown's Ch. R. 156. and Baldwin v. Boulter, there cited. Heniey v. Acton, 2 Brown's Ch. Rep. 17.

(i) The ease of Pope v.Roots, 7 Brown's Parl.Ca. 184. is certainly irreconcileable with the principle of the cases referred to in the margin: it is, however, a single case; (unless the dictum in Stent v. Bailis can be relied upon, 2 P.Wms. 220.) and its authority appears to have been fully considered in the subsequent case of Mortimer v. Capper.—James v. Owen, E. T. 1733. MSS. appears to have proceeded upon a different ground; the plaintiff had agreed to present the defendant to the

court of aldermen, and to refign the place of printer to the city of London in his favour, to which place certain fees and profits were then annexed, but which the court of aldermen intimated their intention to reduce; and, upon that ground, the defendant refused to perform his agreement. The court thought, that the object of the agreement being the then profits, which were not purely contingent, and the plaintiff not having actually furrendered, that the performance of the agreement ought not to be decreed. In Jackson v. Lever, MSS. E. T. 1792, Ch. which was decided on another point, this subject was very much and ably discussed; the argument principally relied on by the plaintiff's counsel was, that if the contract was good in its creation, nothing subsequent ought to be allowed to affect it. The case of Carter v. Carter, Forrester, 271. was referred to, as particularly illustrative of this rule. See alfo Heineccius Elem. J. N. and G. c. 13. f. 353.

SECTION XII.

BUT an unconscionable bargain, as a purchase or security got from an heir in his father's lifetime, is now usually avoided in equity; for he would justly forseit the character of an honest man, who should endeavour to make an advantage

vantage of this easy age (k), and enrich himself at the cost of those, who either could not foresee, or do not rightly apprehend,

(k) The rule upon which courts of equity in these cases proceed, is not merely in respect of the age of the heir contracting, Ofmond v. Fitzroy, 3 P. Wms. 131. In Wiseman v. Beake, Mr. Wiseman was nearly 40 years of age, and a Proctor in the Commons; in Curwyn v. Milner, the heir was about 27 years of age; and in Gwynne v. Heaton, the plaintiff was 23 years of age; which, though not an advanced age, is beyond that which the law recognizes as the age of discretion. But the real object which the rule propofes is, to restrain the anticipation of expectancies, which must, from its very nature, furnish to defigning men an opportunity to practife upon the inexperience or passions of a dissipated man. And this being the object of the rule, its operation is not confined to heirs, but extends to all persons, the pressure of whose wants may be considered as obstructing the exercise of that judgment, which might otherwise regulate their dealings, Smith v. Burrows, 2 Vern. 346. Proof v. Hines, Forrester, 111. Freeman v. Bishop, 2 Atk. 39. Brooks v. Gally, 2 Atk. 34. or whose confidence may have betrayed them to that undue influence which may grow out of particular relations, as between attorney and client, Walmfley v. Booth, 2 Atk. 25. Newman v. Payne, 4 Bro. Ch. Rep. 350. Guardian and Ward, D. of Hamilton v. Mohun, 1 P. Wms. 121. Hylton v. Hylton, 2 Vez. 547. Parent and Child, Cocking v. Pratt, 1 Vez. 400. Master and Servant, Cole v. Gibson, I Vez. 503. and

prehend, the lofs; and fo, in the Roman law (1), the lending money to heirs in their father's lifetime was prohibited expressly (1). And although the money would have been loft, if the heir had died before the father, yet it being an unrighteous bargain in the beginning, for it is not likely he would have made it, but in expectation of an unreasonable advantage, it cannot be helped by matter ex post facto (2). And no difference, whether it was for money lent, or wares taken up to fell again, as improvident heirs are used to do (3). But the dif- Berney v. Put,

(1) Dig. lib. 14. ti . 6. Pothier Traite des Obligatione, par. 1. C. 1. f. 1. art. 3. f. 5. Puff. L. of Nature and Nations, b. 3 c. 6.

(2) Nott v. Hill, 2 Ch. Ca. 1 Vern. 167, 271. 2 Vern. 27.

Wiseman v. Beake, 2 Vern. 121. Twisseton v. Grissith, 1 P. Wms. 310. Curwyn v. Milner, cited in a note to Cole v. Gibbons, 3 P. Wms. 293. Lord Chestersield v. Janssen, 2 Vez. 125. Barnardiston v. Lingwood, Barnardiston, 341. Gwynne v. Heaton, 1 Brow.'s Ch. Rep. 1.

(3) Waller v. Dolr, 1 Ch. Ca. 276. Bill v. Price, 1 Vern. 467. Lamplugh v. Smith, 2 Vern. 77. Whitley v. Price, 2 Vern. 78. Barker v. Vansommer, 1 Bio. Ch. Rep. 149. Hough v. Williams, H. 1790. MSS.

fee Fox v. Macreth, 2 Bro. Ch. Rep. 400. where the various cases upon this branch of equity are collected and referred to their respective principles. And it is upon this principle, as also upon that of public policy, that feamen dealing for their prize-money or wages, are confidered intitled to as much favour and protection in equity as young heirs, they being, as Sir Thomas Clarke observes, a "race of men loose and unthinking, who will almost for nothing part with what they have acquired perhaps with their blood," How v. Weldon, 2 Vez. 516. Baldwin v. Rochford, I Wilfon, 229. Taylour v. Rochford, 2 Vez. 281.

ference.

ference feems to be, if the heir has no maintenance from the father, but was turned out upon unreasonable displeafure; there, perhaps, the bargain, if not excessively beyond the proportion of fuch assurances, shall stand (m), because it is not to supply the luxury and prodigality of the heir, but to keep him from starving. Yet, it must be confessed, that in former times Chancery did not interpose in these cases (4); but the reason was, because there was another court then that did, and this was the Star Chamber, which could not only relieve the plaintist, but

(4) Nottv. Hill, 2 Ch. Ca. 120. Twifleton v. Griffith, 1 P. Wms. 310. Baugh v. Price, 1 Wilson, 320.

- (1) By the Macedonian Decree, fo called from the name of the usurer who gave occasion to it, "all obligations of sons living under the paternal jurisdiction, contracted by the loan of money, were declared null, without any distinction. But if any creditor had lent money for a cause which was just and reasonable, and sufficient to support the equity of the obligation, it was, by a savourable interpretation of the decree of the senate, to be excepted from the general prohibition, according to the quality of the use to which the son put the money which he had borrowed," Domat's Civ. Law. b. 1. tit. 6. f. 4.
- (m) In Gwynne v. Heaton, Lord Thurlow was of opinion, that the circumstance of the heir not being provided for by the father was intitled to no weight whatever;

but punish the defendant (n). And although that court was abolished, for the abuse that was made of its power, (5), yet (5) 16 Car. t. there are many cases, in which we find the want of fuch a jurisdiction. For a man may now practife a notorious cheat, and pay the fine fet upon him by law, which, perhaps, will be 20l. or some such fum, and count all the rest as clear gains by his villany (o).

whatever; nor have I found any case, in which such difference has been proceeded upon by the court; and though it is stated, in Gilbert's History of Chancery, p. 291. as a material circumstance, yet it feems to have been difregarded in Nott v. Hill, Twifleton v. Griffith, Baugh v. Price; fee margin (4).

- (n) Sir William Blackstone observes, that "the just odium into which this tribunal had fallen, before its dissolution, has been the occasion that few memorials have reached us of its nature, jurifdiction, and practice, except fuch as, on account of their enormous oppression, are recorded in the histories of the times." It appears, however, that the jurisdiction of this court did not break in upon the jurisdiction of other courts, except in extraordinary cases, 4 Inft. 63. See also Reeve's History of the English Law, 4th vol. p. 146.
- (0) The action of deceit, in which the plaintiff may recover damages to the extent of the injury he has fuftained, feems to furnish a very sufficient substitute for the abolified jurisdiction of the court of Star Chamber;

ber; and if further provisions were necessary to prevent fraud, they appear to be supplied by the jurifdiction of our courts of equity, which will not allow the party practising a fraud, in any way to derive a beness from it.

SECTION XIII.

LET us now examine more minutely the force of these fraudulent and unequal contracts; for it is certain, on the part of him who committed the fraud, they are irrevocable (p); and if he should require a nullity of the contract, such a demand, which is scandalous, ought not to be granted him (1). Nay, if such a fraudulent person come as plaintiss into a court of equity, to have what was really and bonâ side lent, he shall not have it,

(1) Small v. Brackley, 2 Vern. 602. Montefiori v. Montefiori, 1 Bl. Rep. 363.

(p) It is a maxim in equity, that "he who hath committed iniquity shall not have equity," Francis's Maxims, Max. 2. But this must be understood, where such person is plaintiff; for it he be defendant, the court will not interpose, unless he receive from the other party that to which equity intitles him.

because

because he has committed iniquity (2). But as to all others, a conveyance obtained by fraud is the same as if no conveyance had been made (q); and therefore, a contingent estate, absolutely deftroyed by it, shall yet be set up in Chancery (3), as if it were still subfisting, and nothing had been done. And there are other covenants, which may be avoided only by one fide, as between a minor and one of full age (4); nor is this inequality of the condition of the contractors unjust, for every one ought to know the flate of him with whom he treats. Yet those who are not by nature incapable of contracting, but prohibited by fome positive law, although they cannot legally be forced to fland to their engagements, yet, if they do perform them, they cannot afterwards be relieved (r); for there is a natural obligation,

- (2) Rich. v.
 Sydenham,
 1 Ch. Ca. 202.
 but fee Prieftley
 v. Wilkinfon,
 1 Vez. Jun.
 214.
- (3) Englefield v. Englefield, 1 Vern. 443. Herne v. Herne, Barnardiston, 433.
- (4) Smith v.
 Bowin, 1 Mod.
 25.
 Holt v. Clarencieux, Stra.
 937.
 Crayton v. Afhdown, 9 Vin.
 Ab. 393.
 See alio 1 Roll's
 A . 729 (D.)
 Farnham v. Atkyns, 1 Sid.
 446.

- (q) Upon this principle, which implies the nullity of intention, Lord Thurlow appears to have proceeded in Hawes v. Wyatt, 3 Bro. Rep. 156. in which he held, that a deed obtained by fraud was not a revocation of a will.
- (r) In Cole v. Gibbons, 3 P. Wms. 294. Lord Talbot seems to recognize this rule, where the original contract is impeached, merely as being unreasonable.

ligation, so far as they are not naturally unjust; as in the Roman law, if a son, under power of his father, pays what he has borrowed, to which, though of age, he was not obliged (5); and in catching bargains of young heirs, in our law, always where they are set aside for fraud, plaintiff must do equity to defendant, by paying what was really lent (6).

(5) 1 Domat's Civil Law, b. 4. tit. 6. 2. 23.

(6) Waller v. paying what was really lent (6).

Ca. 276. Bill v. Price, 1 Vern. 467. Barker v. Vansommer, 1 Bio. Ch. Rep. 149. Francis's Maxims, Max. 1.

See also Woodman v. Skute, Pre. Ch. 266. But in Bosanquet v. Dashwood, Forrester, 38. he says, the court would decree money overpaid on an usurious contract to be accounted for, notwithstanding the agreement of the oppressed party to allow such payment. In this case, however, he observed, that the fecurities were not delivered up, and he would not fay what he would have done, if they had been; and upon this circumstance, the court, perhaps, relied, in Smith v. Bunning, 2 Vern. 392. in which cafe, not only the marriage brocage bond was decreed to be delivered up, but also a gratuity of 50 guineas to be refunded. See c. 4. f. 4. Lord Hardwicke, in Chefterfield v. Janssen, 2 Vez. 125. 1 Atk. 354. has brought together and classed all the cases upon the subject of confirmation, and the refult feems to be, that if the original contract be illegal, as usurious, no subsequent agreement or confirmation by the party can give it validity. But if it be merely against conscience, then, if the party, being fully informed of all the circumstances of it, and of the objections to it, voluntarily comes to a new agreement, he thereby bars himfelf

of that relief, which he might otherwise have had in equity; not so, if the confirmation be a continuance of the original fraud or imposition; as in Earl of Ardglass v. Muschamp, 1 Vern. 75. 237. Nott v. Hill, 1 Vern. 167. Berney v. Pitt, 2 Vern. 14. Twisleton v. Griffith, 1 P.Wms. 310. Curwyn v. Milner, 3 P. Wms. 293. 19th June 1731, note (c). Taylor v. Rochford, 2 Vez. 281. Brooks v. Gally, 2 Atk. 34. Cole v. Gibson, 1 Vez. 506. Crowe v. Ballard, 1 Vez. 215. Cockshott v. Bennett, 2 Term Rep. 763.

SECTION XIV.

ALSO an obligation, that was at first invalid, may afterwards recover strength, by the intervention of some new cause, sit to create a right (1); and for this a sull agreement is sufficient, though not expressed by any verbal signs, since others may do as well. So, at the common law, there was an implied as well as express confirmation; as by acceptance of rent, or the like (2); which was sounded on this reason, that the law will never intend a wrong, if the act, by any construction, may be made lawful (3). And he cannot receive the rent, or the like, un-

(1) S iles v. Cowper, 3 Atk.

(2) Pennant's cate, 3 Co. 65. Co. Litt. 295. b. 2 Comyns's Dig. 361.

(3) Co. Litt.

der

der the contract, without a confirmation of it (s). But the acceptance of a collateral thing, or by a stranger to the contract, cannot be supported by any intendment. Nor can an implied confirmation work stronger than if it were express; as to make good a void estate, or one not commenced, or in esse (t). But in natural justice and equity, this is carried surther than at law (u): and therefore, in Chancery,

- (s) As where the wife, after the death of her hufband, accepts rent, referved upon a lease by her and her husband, that amounts to an agreement to the lease, I Comyns's Dig. 573. (S. 3.) Goodright v. Strahan, Cowp. 201. q. Drybutter v. Bartholemew, 2 P. Wms. 127.; or if the wife enter, and take the profits, that amounts to an agreement to the estate, made to her during coverture, 3 Co. 26. a. So if an infant, after his sull age, continue in possession of lands, demised to him during his infancy, he thereby affirms the lease, and makes himself liable to the arrears of rent incurred during his infancy, 1 Roll's Ab. 731. (K.)
- (1) As if a leffee, being an infant, take a new leafe, to commence at a future day, this shall not be a furrender of the old leafe, though the new leafe was to commence at full age, and he then entered and claimed by this new leafe, 1 Roll's Ab. 728. (B.) pl. 2. Lloyd v. Gregory, Cro. Car. 502. Sir W. Jones, 405.
 - (u) "If an obligation be void at law, no new agree-

Chancery, an agreement, though not binding against an infant, yet shall be decreed; the infant having received interest under it after he came of age (4). And fo if (4) Franklin v. he does not expressly fignify his defire to be relieved, when he has convenient means, it is to be prefumed, that he is willing to abide by it (5); as where a lease (5) Cecil v. Earl of Salisbury, was made by an infant, and stood unquef- 2Vernon, 224. tioned, and the rent was received, by a 1 Atk. 489. person under no disability, for five years, this filence amounts to a confirmation (v); and, according to the civil law, the queftion must not only be moved in five years, but decided in ten.

Thornbury, 1Vernoa, 132.

Smith v. Law,

ment can make it better; the original corruption will infect it throughout. But as bargains, that are not cognizable at law, are properly the fubject of confideration in equity, new agreements and new terms may confirm what might otherwise admit a question, as to their fairness."-P. Lord Hardwicke, Chesterfield v. Janssen, 1 Atk. 354. See Shirley v. Martin, 14th Nov. 1779. in which case the court of Exchequer was of opinion, that contracts avoided on reasons of public inconvenience, would not admit of subsequent confirmation by the party.

(v) This must be confined to leases which are only voidable; for leafes which are absolutely void cannot be confined to the subsequent receipt of rent. See Doe v. Butcher, Dougl. 50. and Goodright v. Humphreys, there cited: but fee Stiles v. Cooper, 3 Atk. 692.

CHAP. III.

Of Testimony of Assent.

SECTION I.

TE are now come to our fecond division, which was the want of testimony of the affent. The usual figns of confent being words, we must inquire what words will make a covenant to be performed in specie. And here we may observe, that although a covenant is properly of a thing future or past; for if it be of a matter in præsenti, it vests an immediate property, and amounts to a gift or grant, the nature of which is to be executed immediately (1): yet even at law, whenever the intention of the parties can be collected out of a deed, for the doing or not doing a thing, covenant will lie. For a covenant is but an obligatory agreement of the parties by deed; and any words, which shew the intent, are sufficient for this purpose (2). And therefore a covenant will lie on a bond (3), or the reddendum in a leafe;

(1) Plow. Com. 308. a.

(2) 2 Com. Dig. 444. (A. 2.) F. N. B. 145. a.

Plow. Com. 140. a. 1 Vez. Brill v. Carr, 1 Lev. 47. Norris's case, Hard. 178. Cro. Car. 207. (3) Hill v. Carr, 1 Ch. Ca. 294.

for it proves an agreement (4). So whatfoever words amount to a grant, will make a leafe (5); for where there is substance, the law will apply the words to the intent, though they found differently (6). the reason of this was, that chattels were of little value at the common law, when personal property was but small, and leases for above forty years (a) were not permitted (7). But for the passing the freehold and inheritance, there were always required apt words, or words tantamount. Yet, although at the common law it is faid, that the law should rule the intent, and not the intent the law, where there is a good confideration, and no doubt of the intent, equity will relieve against the rigour of the law, and make the conveyance valid (b). And this is agreeable with the

- (4) 1 Roll's Ab. 519. pl. 10. Gilesv. Hooper, Carth. 135. (5) Co. Litt. 45. b.
- (6) Plow. Com.
- (7) Co. Litt. 45. b. 46. a. Wind v. Jekyll, 1 P. Wms. 574.

(a) Lord Coke does not appear to have confidered this a general law, but merely as the ancient law, for many respects; and SirWilliam Blackstone, 2Com. 142. observes, that if this law ever existed, it was soon antiquated; Mr. Madox's Collection of ancient Instruments, referring to several leases for a longer term, of as early a date as the reign of Richard the Second.

(b) The maxim of law, verba intentioni debent infervire, fecures to all deeds, and other inffruments, Vol. I.

L a con-

the rule of the civil law. For there no fet form of words, or of writing, was required

a construction the most favourable, and as near the minds and apparent intent of the parties, as the law will allow; and it does not appear, from any cafe, that courts of equity have assumed to themselves, in the construction of deeds, &c. the right of giving to this maxim, in favour of the party's intent, a more extensive or liberal operation. For "rules of property, rules of evidence, and rules of interpretation, in both courts, are, or should be, exactly the same: both ought to adopt the best, or both must cease to be courts of justice," 3 Bla. Com. 434. See Doe v. Laming, 2 Burr. 1108. 14 Vin. Ab. Tit. Intent; therefore, in those cases, in which courts of equity have given to certain words a construction, different from that which they have received in a court of law, the difference of construction must be referred to the difference of the fubject matter; which difference in the fubject matter would have occasioned the same difference of construction, even in the fame court. See Fearne's Effay on Cont. Rem. 220. 4th ed. where this subject is very claborately confidered. In the construction of articles. or under certain circumstances of deeds, with reference to articles, courts of equity will make the expression subservient to the evident intention of the parties, either by controlling the strict and ordinary sense of the words, or by supplying necessary words. See notes to fect. 2. and Kentish v. Newman, I P. Wms. 234. So, also, in cases of trusts, Targus v. Puget, 2Vez. 194. But if the agreement be executed, courts of equity are governed by the rules of construction which prevail at law; the liberality of which is particularly manifested

ed in contracts (8); but they were perfect- (8) Cod. lib. 2. ed by the bare affent of the parties. A fortiori.

nifested in Walker v. Hall, 2 Lev. 213. Coltman v. Senhouse, 2 Lev. 225. Croffing v. Scudamore, 2 Lev. 9. Ofman v. Sheafe, 3 Lev. 370. Sleigh v. Metham, 1 Lutw. 782. Spalding v. Spalding, Cro. Car. 185. See also Hewitt v. Ireland, 1 P. Wms. 426. Hebblethwaite v. Cartwright, Forrest. 31. But though courts of law, in the construction of deeds, &c. endeavour to effectuate the intent, by giving to the words the most liberal and favourable construction, yet they require a first attention to those forms and ceremonies which are prescribed, as effential to the legal operation of certain instruments; and where fuch forms or ceremonies have been omitted, it becomes necessary, as already observed, ch. 1. f. 7. to refort to a court of equity, for the purpose of supplying the want of them. It may, however, be proper to observe, that, in such cases, equity does not relieve, by dispensing with the legal requisites, but by decreeing that to be done, which, when done, renders the conveyance good at law. There certainly, however, are fome instances, in which courts of equity feem to difpense with legal requisites; but, upon examination, it will be found, in most of fuch instances, that they are peculiarly the subject of equitable jurisdiction, and therefore immediately liable to fuch rules as equity prescribes. Thus, when it was solemnly decided, that a common recovery, fuffered by the ceftuy que trust in tail in possession under the trustees, would be sufficient to bar all equitable remainders depending on such estate tail, although there was no legal tenant to the præcipe; Lord Nottingham, C. stated the grounds of

fortiori, where the contract is good at law, equity will carry it into execution

his decree " to be natural justice, (which is the rule in Chancery,) and not the niceties in law; and that there was no fuch thing as an estate tail of a trust, but that it is created by and subject to the rules of the court," North v. Way, 1 Vern. 13. Boteler v. Allington, I Bro. Rep. 72.: and fo strictly do courts of equity confine themselves within the reason of this decree, that though, by the recovery of the cestuy que trust in tail, the equitable remainders expectant thereon are barred, yet they do not allow any legal remainder to be affected by it, Robinson v. Cumming, Forrest. 164. 1 Atk. 473. Salwin v. Thornton, Amb. 545. 600. Cruise on Recoveries, 241.; nor will courts of equity support a recovery by the cestuy que trust in tail, if there be an estate for life in another, prior to fuch estate tail; because, in such case, if the legal eftate had been conveyed and executed according to the truft, fuch recovery would not have been good at law, unless the tenant for life had joined in it-Per Lord Nottingham, North v. Champernon, 2 Ch. Ca. 63. 78. in which case his Lordship laid it down as a general rule, that "any legal conveyance or affurance, by a ceftuy que truft, should have the same effect and operation upon the truft, as it would have had upon the legal estate in law, in case the trustees had executed their trust; as otherwise, trustees, by refusing, or not being capable to execute their trust, might hinder the tenant in tail of the liberty to dispose of his estate. and bar the remainders, which the law gives him, as incident to his estate; which would be manifestly inconvenient, and tend to the introducing of perpetuities."

on (c). And so where there was no express covenant concerning the value of the

tuities." See Burnaby v. Griffith, 3 Vez. 276. Bowater v. Ellis, Pre. Ch. 81.

(c) This proposition is too generally stated; for though equity will enforce the specific performance of fair and reasonable contracts, where the party wants the thing in specie, and cannot have it in any other way; yet, if the breach of the contract can be, or was intended to be, compensated in damages, courts of equity will not interpose. See Errington v. Annesley, 2 Bro. Rep. 341. Cudd v. Rutter, 1 P. Wms. 570. Capper v. Harris, Bunb. 135. fee c. 1. f. 5. n. and c. 3. f. 5. It is observable, that the legal validity of the contract makes a term in the proposition stated by our author: but, upon the necessity of the contract being good at law, in order to entitle the party to a fpecific performance in equity, a contrariety of opinion appears to have prevailed. In Cannel v. Buckle, 2 P. Wms. 243. Lord Macclesfield distinctly afferts, "that it is not a true rule, that where an action cannot be brought at law, on an agreement for damages, that a fuit in equity will not lie for a specific performance:" and the case of Cannel v. Buckle seems to bear out the observation; for clearly, the wife could not maintain an action at law against her husband; and yet equity did enforce performance of an agreement which the husband had entered into in her favour. See also Acton v. Pearce, 2 Vern. 480. Cage v. Acton, I Lord Raym. 515. In Dr. Bettefworth v. Dean and Chapter of St. Paul's, Sel. Ca. Ch. 67 69.

the lands to be settled, but only the marriage articles recited them to be 500l. per annum, yet equity decreed the deficiency to be made up out of other

(9) Gleg v. Gleg. lands (9). 5 Vin. Ab.

p. 511. pl. 21. Benfon v. Bellafis, 4 Vern. 16.

Lord Chief Justice Raymond as distinctly affirms, that " a specific performance shall never be compelled, for the not doing of which the law would not give damages." And Lord Hardwicke, in Dodsley v. Kinnersley, Amb. 406. in support of this rule, states, that " it was the practice, before Lord Somers's time, as to agreements, to fend the party to law; and if he recovered damages, then to entertain the fuit." See the Marquis of Normandy v. Duke of Devenshire, 2 Freem. 217. Upon this difference of opinion, it would ill become me to do more than to observe, that as the case before Lord Macclesfield did, from its circumstances, demand the interpolition of a court of equity; and as the fame relief had been before given, in Cage v. Acton, by Lord Keeper Wright, the rule stated by Lord Chief Justice Raymond, however well founded as a general rule, must give way, where injustice would result from a strict adherence to it, See Francis's Max. 6.

SECTION II.

AND although they formerly thought, that where there was a bond given to perform an agreement, the obligor had his election, either to do the thing, or pay the money; and that the obligee, having chosen his security, ought to be left to it: yet now they consider the penalty only as a collateral guard to the agreement, which still remains the same, and unimpeached by the parties, providing a surther remedy at law for the performance; and, therefore, proper to be executed in this court (d). So if the obligor

(d) "Where a penalty is intended, merely to secure the enjoyment of a collateral object, the enjoyment of the object is considered as the principal intent of the deed, and the penalty only as accessional; and therefore only to secure the damage really incurred." Per L. Thurlow, C. Sloman v. Walter, I Bro. Rep. 418. But see Saville v. Saville, 1 P. Wms. 745. And upon this construction of a penalty, courts of equity will interpose, to restrain proceedings at law to recover the penalty. But as courts of equity will interpose to restrain the recovery of the penalty, the principles of equal justice require, that they should enforce the specific performance of the act agreed to be done, or re-

obligor dies before the day, yet the lands must be settled according to the agreement;

strain from the doing of that, which it was agreed should not be done. And upon this principle, wherever the primary object of the agreement be the fecuring of the specific subject of the covenant, the party covenanting is not entitled to elect, whether he will perform his covenant, or pay the penalty. See Hobson v. Trevor, 2 P.Wms. 191. Parks v. Wilson, 10 Mod. 517. Chilliner v. Chilliner, 2 Vez. 528. But if the covenant be to do, or not to do, some particular act, or doing it, or neglecting to do it, to pay a certain fum, by way of liquidated damages, courts of equity will not relieve against the payment of such damages, East-India Company v. Blake, Finch's Rep. 117. Ponfonby v. Adams, 6 Bro. P. C. 417. Rolfe v. Paterfon, 6 Bro. P. C. 470. Lowe v. Peers, 4 Burr. 2228. See also Small v. Lord Fitzwilliam, Pre. Ch. 102. Ray v. D. of Beaufort, 2 Atk. 190.; but see Benson v. Gibson, 3 Atk. 395. And as courts of equity will not relieve against stipulated damages, they will not, in general, interpole to enforce the performance of the covenant, or to restrain its violation. Therefore, where the leffee covenanted not to plough certain land, or if he did, to pay 20s. per acre per ann. the court refused to restrain the lessee from ploughing, Woodward v. Gyles, 2 Vern. 119. But there are some circumstances which will induce the court to interfere, though stipulated damages be referved; as where the lessee had covenanted not to plough ancient meadow, or if he did, to pay an increase of rent; the court, upon his threatening to plough, appears to have granted an injunction, Webb v. Clarke, 8th May 1782. Sec alfo

ment; and so it has been often done (1). For it would be hard that the enlarging his security at law should make him in a worse condition in equity than if he had taken none at all; nor can it ever be intended, that a bond, added only to enforce the performance, should weaken the lien of the agreement (e).

(1) Holtham v, Ryland, 1 Eq. Ca. Ab. 18. pl. 8. Nelfon's Rep. 205.

also Dulwich College v. Davis, M. 1787. Sir John Warden v. Eklers, 17 Dec. 1739.

(e) It may be laid down as a general rule, that the agreement of the parties, if express, ought not to be affected by the taking of a collateral security, intended merely to secure the performance of such agreement; but if the agreement be merely implied, as that the vendor shall have a lien on the estate till the purchase money be paid, (Chapman v. Tanner, 1 Vern. 267. Walker v. Preswick, 2 Vez. 622. Pollexsen v. Moore, 3 Atk. 272.) the taking of a bond, or other security, for the purchase money, might reasonably lead to the conclusion, that the vendor trusted to such security, and that the property of the estate was intended to be absolutely vested in the vendee, Bond v. Kent, 2 Vern. 281. Fowell v. Heelis, Ambler, 724. but see Blackburn v. Gregson, 1 Bro. Rep. 420.

SECTION III.

RUT, regularly, the law never gives any other remedy, than what the party has provided for himself, for this would be to alter the agreement of the parties (1); though, in some cases, it is otherwise. And the diversities seem to be thus fettled: 1st, Where there is no remedy at law, equity will certainly grant one (f). As in case of a rent-seck. to decree feifin; or where the deeds, by which it is created, are loft, and fo uncertain what kind of rent it was: for wherever there is a right, there ought, in equity, to be a remedy for it (g). But if a man comes to be remediless at common

(f) Courts of equity not fuffering a right to be without a remedy, interpose in all cases in which the right is clear, but, from the want of particular evidence, &c. unavailable at law. See Francis's Maxims, Max. 6. where the cases, illustrative of this rule of equity, are brought together, and very forcibly applied.

(g) The cases of rent, antecedent to the statute of Anne, must now be laid aside; for, whether it be rentfeck, or rent-fervice, the leffor may now diffrain, or bring his action of debt: but still there are cases, in which

(1) Earl of Warrington v. Sir J. Langham, Pre. Ch. 89. Bofville v. Brander, 1 P. Wms. 461. Jordan v. Sawkins, 12 Dec. 1793. Champernon v. Gibbs, Pre. Ch. 126. 2 Vern. 382. But fee Legard v. Hodges, 1 Vez. Jun.

mon law, by his own negligence, he shall not be relieved in equity. As if a man loses his deed (2), unless he can (2) Vincent v. make

Beverley, Noy,

which it is necessary for courts of equity to interpose; as where the premises are stated to be uncertain, Eaton College v. Beauchamp, 1 Ch. Ca. 121. Duke of Bridgewater v. Edwards, 4 Bro. P. C. 139.; or where the days on which the rent is payable are flated to be uncertain, Holder v. Chambury, 3 P. Wms. 256.; or its nature be uncertain, Collett v. Jaques, 1 Ch. Ca. 120. Benfon v. Baldwin, 1 Atk. 598. Cox v. Foley, 1 Vern. Bouverie v. Prentice, 1 Bro. Ch. Rep. 200. or where there are no demefne lands, on which to distrain, Duke of Leeds v. Powell, 1 Vez. 170. 171.; or where the distress is obstructed by fraud, Davy v. Davy, 1 Ch. Ca. 147.; or where no diffress can be made, the fubject being of an incorporeal nature, as where a rent is issuing out of tithes, Thorndike v. Allington, I Ch. Ca, 79. Berkeley v. Earl of Salifbury, cited by Lord Thurlow, in Duke of Leeds v. Corporation of New Radnor, 2 Bro. Rep. 338. 518. The case of the Duke of Leeds v. Corporation of New Radnor may, in 'its first impression, be thought to have been relievable at law; for though, for the purpose of making it the subject of equitable jurisdiction, the bill alledged, that the lands in question had undergone various alterations in their boundaries, yet the defendants, by their answer, denied, that any alteration whatever had taken place in fuch particular, and infifted that the plaintiff's remedy was at law; and Lord Kenyon, then Master of the Rolls, appears to have been of fuch opinion, but he retained the bill for a year. Lord Thurlow, C. however, conceived

make it appear, that it was once actually in his custody, and that he has been deprived of it by some casualty or misfortune (b). So if a man destroys his remedy to distrain, and cannot have debt for the arrears, it being due out of a free-hold,

the legal remedy to be doubtful, and was of opinion, that the defendants having admitted the plaintiff's right, and the bill having been retained, had done away the objection pressed against the jurisdiction of the court. It may be material to observe, that his lordship's opinion went upon the grounds of an admission of the right, and the previous retaining of the bill. As to the admission of the right, if it stood alone, that probably would not be thought a fufficient circumstance to give to a court of equity cognizance of a matter not properly within its jurisdiction; and with respect to the bill having been retained for a year, the fame circumstance occurred in Ryan v. Macmath, 3 Bro. Rep. 15. notwithstanding which the suit was dismissed for want of equity. See also Curtis v. Curtis, 2 Bro. Rep. 620. where this point was very much confidered.

(b) The bare allegation, that a deed or other instrument is lost, is certainly not sufficient to sound a right to relief in equity; for, as already shewn, c. 1. s. where relief is sought upon a deed, or other instrument, alledged to be lost, an affidavit must be filed with the bill, stating that the plaintiff has not such deed in his possession, &c.; and it is surther necessary, that the plaintiff should prove that such deed, &c. had once existence: but I am not aware that it is necessary for the plaintiff

hold, he shall not be relieved for them in equity (3). So in cases proper for law, a (3) 1 Roll's Ab. man must defend himself by legal pleadings. And a court of equity is not to relieve either mispleading, or where there is a neglect and want of a plea, or no proper plea put in in time (i); for it was his own fault (4). So equity will not relieve for mesne profits, unless in case of a trust, or an infant (k), where no entry was made

375. pl. 3.

(4) Anon.
1 Vern. 119. Blackhall v. Coombes, 2 P. Wms. 70. Stephenson v. Wilfon, 2 Vern.

bv

Ex parte Goodwyn, 2 Vern. 696. But see Robinson v. Bell, 2 Vern. 146. Lady Gainsborough v. Gifford, 2 P. Wms. 424.

plaintiff to thew that it was ever in his custody, if it appears to have existed, and to have been in the custody of the person under whom he derived his title.

- (i) Equity will relieve against the mispleading of infants. See c. 2. f. 4. and that evidence may be gone into upon a rehearing, which was not upon the record when the cause was originally heard, see I Eq. Ca. Ab. 43. 1 Vern. 140. Pra. Reg. 317. Praxis alma, 14.
- (A) In the case of the Duke of Bolton v. Deane, Pre. Ch. 516. Lord Macclesfield held, that if any fraud had been used to conceal the title from the leffor, the court would decree an account of mesne profits. And in Curtis v. Curtis, 2 Bro. Rep. 620. the Mafter of the Rolls extended the benefit of fuch account to a dowress; who is now confidered as entitled, in all cases, to come into equity for her dower, if she prefer fuch mode to proceeding at law; and though she die before her right to dower be established, equity will decree

(5) Owen v. Aprice, I Ch.

Rep. 17. Hutton v. Simpson, by the person entitled to the mesne profits (5). 2dly, Where there is a remedy at law, equity will not grant a further one.

2 Vern. 724.
Tilly v. Bridges, Pre. Ch, 252. Duke of Bolton v. Deane, Pre. Ch. 516. Norton v. Frecker, 1 Atk. 524.

decree an account of the rents and profits of the estate, of which she was dowable, in favour of her representatives, Wakefield v. Child, 8th July 1791, MSS. Courts of equity, when reforted to for the purpose of an account of mesne profits, will, in many cases, confult the principle of convenience; and therefore, in Townsend v. Ash, 3 Atk. 336. Lord Hardwicke held, that "though the party claiming a share in the New River Water-works had not established his right at law, yet, as fuch right appeared to the court, he ought to have an account of the mesne profits; for though shares in water-works are a legal estate, and corporeal inheritance, yet no one proprietor could receive the profits himself, but the company, or their officers, are the common hand to receive the profits; and that it would be abfurd to fend the plaintiffs to law, for it would be difficult to bring ejectment for a thirty-fixth part, and bits of land in feveral counties, and to bring actions of trespass against the terre-tenants would be very extraordinary; and therefore, in point of remedy, there could not be a stronger case for an account of melne profits."-Courts of equity, in decreeing an account of mesne profits, where the plaintiff has been prevented from afferting his title by infancy, a trust, or fraud, will direct fuch account to be taken from the time the plaintiff's title accrued, unless special circumstances require that such account should commence from the time of entry, or of filing the bill, Dormer v. Fortescue.

one, although the remedy at law is not fufficient (1); unless there be some fraud, or the like (6). And therefore, in all cases, where the court has decreed payment of the rent, and thereby charged

(6) Davey v.
Davey, 1 Ch.
Ca. 144.
Duke of Bolton
v. Deaffe, Pres.
Ch. 516.

v. Fortescue, 3 Atk. 130. Bennett v. Whitehead, 2 P. Wms. 643. But it may be proper to observe, that, even in the most favoured cases, in taking the account of rents and profits, interest is feldom allowed, especially if the fum be small and uncertain, Ferrers v. Ferrers, Forrest. 2.3. Micklethwaite v. Boatman, I Ch. Rep. 97. Batten v. Earnley, 2 P. Wms. 163. 2 Atk. 211. 411. See also Tew v. Lord Winterton, 1 Vez. Jun. 451. and the cases there referred to. The cases, decreeing an account of rents and profits, where the legal title is not previously established, proceed upon that respect, which, in justice, is due to the interests of persons, who, by infancy, or fraud, &c. have been prevented from purfuing their legal right; but it must not be inferred, from the extreme anxiety of courts of equity to protect fuch rights, that they will, at any period, or under any circumstances, act upon such indulgent disposition; for if an infant neglect to enter within fix years after he comes of age, he is as much bound, by the statute of limitations, from bringing a bill for an account of mesne profits, as he is from an action of account at common law, Lockey v. Lockey, Pre. Ch. 518.; or if there be a verdict at law against the infant's title, courts of equity will not direct an account of mesne profits, but will merely retain the bill, for the purpose of giving the infant an opportunity to establish his title at law, E. of Newburg v. Bickerstaff.

(7) Palmer v. Whettenhal, 1 Ch. Ca. 184.

the person, no other remedy could be obtained. And the usual relief, even where, for want of feifin, there was at law no remedy, is only to decree feifin (7). But this is to be understood of a remedy provided by the party himself; as in a grant, or refervation of a rent by deed; otherwife of a devise of a rent, in which the devifor is intended to have been inops confilii: for this is a particular mischief, not against any maxim or rule, though unprovided for by the law (8).

(8) Shute v. provided Malory, Moore, 805. 1 Eq. Ca. 364. pl. 1.

v. Bickerstaff, 1 Vern. 295. But if plaintiff has been kept out of possession by fraud, Q. whether equity will not relieve at any distance of time, as no length of time will bar a fraud of which the party affected by it was not apprised? Cottrell v. Purchase, Forrest. 63.

It may here be proper to confider, whether a court of equity will decree an account of mesne profits against an executor in respect of the testator's having, by an injunction, restrained the plaintiff from recovering at law, in the lifetime of the testator. If the court were not to decree an account in such a case, its interference would work a wrong, because the plaintiff might have recovered at law in the lifetime of the teltator, if he had not been fo restrained. But if the court should interfere, and the defendant shew an equity at least equal to that of the plaintiff, its interference would deprive the defendant with an equal equity of the legal right.

(1) There are instances, indeed, in which a court of equity gives remedy where the law gives none; but "where a particular remedy is given by law, and that remedy bounded and circumfcribed by particular rules, it would be very improper for a court of equity to take it up where the law leaves it, and extend it further than the law allows." P. Lord Talbot, C. Heard v. Stamford, Forrest. 174.; but see Dormer v. Fortescue, 3 Atk. 124. Curtis v. Curtis, 2 Bro. Rep. 633. in which cases it was held, that equity will give relief beyond that which the party could obtain at law, if the recovery of the demand has been unconscientiously obstructed.

SECTION IV.

THERE is also an implied as well as an express affent; as where a man who has a title, and knows of it (m), stands by, and either encourages, or does not forbid the purchase, he shall be bound, and all claiming under him by it (1). Neither shall infancy or cover- (1) Hobbs v. ture be any excuse in such case (2). And this

Norton, 1 Verna 136. liunfden v. Cheyney, 2 Vern. 150.

Draper v. Borlace, 2 Vern. 370. P. Lord Hirdwicke, Arnott v. Bigle, 1 Vez 95. Rawv. Pole, 2 Vern. 239. Berrisford v. Milward, 2 Atk. 49. (2) Watts v. Creffwell, Clare v. E. of Bedford, cited in Savage v. Foster, 9 Mod. 38. Evroy v. Nichols, 2 Eq. Ca. Ab. 489. Becket v. Cordley, 1 Bro. R. 353.

(m) In the case of Dyer v. Dyer, 2 Ch. Ca. 108. Lord Chancellor Finch held, that the defendant's ig-VOL. I. norance (3) See Stiles v. Cooper, 3 Atk. 692.
Anon. Bunb. 53.
Henning v.
Ferrers, Gilb.
Rep. 85.

this feems a just punishment for his concealing his right; by which an innocent man is drawn in to lay out his money (n) (3). And for the same reason, such fraud in a mortgagee will, without doubt.

norance of his title materially differed the case; but in Teafdale v. Teafdale, Sel. Ca. Ch. 59. Lord Chancellor King postponed the title of the father to that of his fon's widow, upon the ground of the father having allowed and witneffed the fettlement made by the fon on his marriage, under the notion that the fon was tenant in fee; whereas he proved to be only tenant for life, and the father remainder-man in fee. It is observable, however, that, in this case, the Chancellor adverted to the near relation of father and fon, and threw out, that had the real titles of the parties been fully understood, the father would have been required to join in the fettlement, or the marriage would not have taken place. His Lordship, however, by the reporter, is made to conclude with observing, that "as the father knew of the fettlement, he should not take advantage against it." See Pearson v. Morgan, 2 Bro. Ch. Rep. 388.

(n) If a man, by the suppression of the truth, which he was bound to communicate, Fox v. Macreth, 2 Bro. Ch. Rep. 420. or by the suggestion of a falsehood, be the cause of prejudice to another, who had a right to a sufficient representation of the fast, it is certainly agreeable to the distates of good conscience, that his claim should be postponed to that of the person whose considence was induced by his representation; and upon that principle, the cases referred to in the margin (1) evidently proceeded; but where the party

doubt, postpone his mortgage (4). So if A. make an absolute conveyance to B. for 500l. and B. executes a defeafance,

(4) Draper v. Borlaie, 2 Vern, 370. Berrisford v. Milward, 2 Atk. 49.

upon

to whom the fraud is imputed, was not conusant of the treaty in which the fraud was practifed, nor in any manner, nor for any fraudulent purpose, confederating with the party practifing the fraud, the above principle does not apply. Therefore where A. lent money to B. on mortgage, but before he did so, sent C. to inquire of D. who had a prior mortgage, whether he had any incumbrance on B.'s estate, who denied he had any; D. by his answer, having denied that C. told him that A. was about to lend B. any money: the Lord Keeper, upon appeal, directed an iffue at law, to try whether C. did or did not communicate such fact to D. Ibbetsen v. Rhodes. 2 Vern. 554. This iffue would have been fuperfluous. if the bare naked falsehood had been a sufficient ground for postponing the demand of D. See Pasley v. Freeman, 3 Term Rep. 51. in which case, the effect of this distinction at law, is fully and ably investigated. It may be proper, in this place, to confider, what shall be construed a concealment. In the case of Mocatta v. Murgatroyd, 1 P. Wms. 393. Lord Chancellor Cowper held, that where a first mortgagee is a witness to the second mortgage, though no actual proof of his knowing the contents thereof, yet, fince the prefumption is, that he might have known them, it shall postpone him: but none of the cases feem to come up to this point; and in Becket v. Cordley, 1 Bro. Ch. R. 353, Lord Chancellor Thurlow, referring to this case, observes, that " he did not leave it as a case, which he should determine in the same manner, for a witness in practice is not privy to the M 2

upon payment of 1500l. within fixteen years, and B. on his marriage, fettles this as an absolute estate on his wife, and the iffue

'contents of the deed." Vide Dig. lib. 13. t. 7. 39. Domat's Civil Law, b. 3. t. 1. f. 15. p. 365. where the point is fully confidered. It has also been laid down, as "an established rule in equity, that a second mortgagee, who has the title-deeds, without notice of any prior incumbrance, shall be preferred; because, if a mortgagee lend money, without taking the title-deeds, he enables the mortgagor to commit a fraud." P. Buller, J. Goodtitle v. Morgan, 1 Term Rep. 762. fraud imputed to the first mortgagee by this supposed rule of equity is, the enabling of the mortgagor to practife a fraud upon a third person, by leaving him in possession of what furnishes the best evidence of his title; and there are cases to which this rule might wifely and equitably be applied; but to lay it down as applicable to every cafe, in which the mortgagor appears in poileffion of the deeds at the time of the fecond mortgage, were not only to break in upon the authority of many decifions, but also, under some circumstances, to endanger the equity which it professes to promote. It would postpone the first mortgagee of an estate held in jointenancy, or in common, the jointenants being equally entitled to possession of the deeds. The whole of the premises contained in the deeds must be in mortgage, though the intent of the parties might extend to only a particular part of them; or the mortgagee of the part must retain the possession of the deeds which respect the whole. These considerations have induced courts of equity to look to the circumstances under which the mortgagor obtained, or was allowed to retain,

issue of that marriage, there being proof that A. made the conveyance to enable B. to get a fortune, though another lady, and not the wife he really married, yet he shall be bound as particeps criminis, notwithstanding that the wife's father had notice of the deseasance before the settle-

the title-deeds; and therefore, in the case of Peter v. Rusfel, 1 Eq. Ca. Ab. 321. pl. 7. 2 Vern. 726. it appearing that the mortgagor obtained possession of the title-deeds from the first mortgagee upon a reasonable pretence, Lord Cowper dismissed the bill brought by the second mortgagee to postpone the first. So in Penner v. Jemmett, MSS. 28th June 1785, it appearing that the first mortgagee had required, and was affured by the mortgagor that he had delivered to him, all the title-deeds. Lord Chancellor Thurlow held, that there must be a voluntary leaving of the deeds, to entitle the fecond mortgagee to gain the priority. So in Towle v. Rand, 2. Bro. Ch. R, 650. which was the mortgage of a reversion, Lord Thurlow, C. decreed for the first mortgagee. And in Plumb v. Fluit, MSS. 3d Feb. 1791, the court of Exchequer, in a very folemn and most able judgment, held, upon the general question, that the merely leaving of the title-deeds in the possession of the mortgagor was not of itself a sufficient ground to postpone the first mortgagee. The rule laid down by Lord Thurlow, C. may, therefore, be now confidered as the rule of equity; viz. that nothing but a voluntary, distinct, and unjustifiable concurrence, on the part of the first mortgagee to the mortgagor's retaining the title-deeds, shall be a reason for postponing his priority.

ment made (o). So if A. agrees for the purchase of timber, and he and B. enter into a bond that A. his executors and administrators, shall not cut down timber under such a size, it comes out that A.'s name was only made use of for B., B. cuts down timber under the size, there can be no remedy against B. upon this bond; but it is a fraud upon the seller, and relievable in equity. But this relief is extended only to jointures, mortgages, and such as come in upon a consideration, and not to a voluntary devise (4).

(4) Raw and Uxor v. Pole,

2 Verp. 239. Pre. Ch. 35.

It would ill become me, upon a rule so reasonable in its application to particular cases, and so fortified by a concurrence of authority, to observe more than that it must, if allowed to operate as an universal rule, preclude the possibility of a mortgagee being at any time certain of his security; a consequence which so feriously affects the real property of the country, as to call for the intervention of the legislature to surnish some mean by which its general inconvenience may be obviated. But though courts of equity will not, on such ground, posspone the first mortgagee, yet, it seems, that they will not take from the second mortgagee the title-deeds, unless the first mortgagee pay him his money, Head v. Egerton, 3 P. Wms. 279.

(0) To the principle of this case may be referred the several cases in which courts of equity have held the party

party colluding in a mifrepresentation barred from disturbing the claims of such persons as the law considers purchasers for valuable consideration. See c. 4. f. 11.

SECTION V.

HOWEVER, where the intent is only to give damages, equity will not decree a specific performance (p); as where a settlement is made to the husband for life, remainder to his intended wife for life, remainder to the heirs of the body of the husband on the body of the wife, remainder to his own right heirs, with a covenant, that he would not dock the entail, nor suffer a recovery. Although this covenant seems to be executory, and like a covenant, that a man would not execute a power to make leases, yet there

⁽p) The cases of Bagg v. Foster, and Collins v. Plumer, referred to in the margin, are direct authorities in support of this rule of equity: it must not, however, be extended to cases of articles, or executory agreements, for the performance of which a penalty is reserved. The grounds of this distinction I have had occasion to consider, c. 3. s. 2.

is a difference, where the agreement is fubsequent to the raising the power to extinguish it, and the case here, where all is in the same deed. For the party here knew that he had a power to bar the entail, and therefore agrees to accept of a covenant, by which he is to have damages only, and not the thing in specie; for that would be to carry it beyond the agreement (1)

(1) Bagg v. ment (1).

1 Ch. Ca. 188, 189. Collins v. Plumer, 1 P.Wms. 104. 2 Vern. 635.

SECTION VI.

THE agreement ought also to be complete and perfect; for pacta contractuum præparatoria are not binding (1), either in law (q) or equity (2). As if,

(1) Puff B. 3. (1), either in la c. 5. 6. 8, 9. (2) Whaley r. Bagnall, 6 Bro. P. C. Whitchurch v. Bevis, 2 Bro. Rep. 559.

> (q) The rule of law is, actus incoeptus cujus perfectio pendet ex voluntate partium revocari potest, Lord Bacon's Maxims of the Law, Reg. 20. and the rule of equity seems to be conformable with the rule of law; for "if there be general instructions for an agreement,

if, upon a treaty of marriage, the father and husband go to counsel, who, hearing the proposals on both sides, takes down minutes or heads of them in writing, and gives them to his clerk to draw a settlement; these preparatory heads might have received several alterations or additions, or the agreement have been entirely broken off, upon surther inquiry into the parties circumstances; and therefore, if they marry without the consent of the father, it is at their peril; for there is no case where an agreement, though wrote by the party himself, should bind, if not signed, or in part executed by

agreement, confishing of material circumstances, to be hereafter extended more at large, and to be put into the form of an instrument, with a view to be figned by the parties, and no fraud, but the party takes advantage of the locus penitentiæ, he shall not be compelled to perform such an agreement as that, when he insists upon the statute of frauds." P. Lord Thurlow, C. Whitchurch v. Bevis.

(r) Though the court will, in general, infer the confent of the party, from his being prefent at the marriage; yet, if he has expressed his disapprobation, and endeavoured to prevent its taking place, the court will leave the husband to recover the proposed portion at law, Douglas v. Vincent, 2 Vern. 202.

him

(2) Bawdes v. Lord Amherst, Pre. Ch. 402.

(3) Cookes v. Mascall, 2 Vern. 200. (r) Halipenny v. Ballett, 2 Vern. 373. Parker v. Serjeant, Finch's Rep. 146. Maclean v. Nash Ex. Hil. T. 1788.

him (2). But if the marriage had been had upon the foot of this writing, and the father had been privy and consenting to it, he should then have been obliged to execute his part (3). So in a will, if the writing be but a draught, or preparation to a testament, and not a testament itself, it is without any force, for the testator must have animum testandi (s). But notes taken from the mouth of the deceased of his last will, or made by his appointment, and read to him, though not writ in form of law, were a sufficient will in writing, upon the statutes of 32 and

(s) It is certainly true, that the animus testandi must be collected from the instrument, or the law will not confider it as a will; but it may be material to observe, that though the writing be not figned or witneffed, it is not from the want thereof to be confidered, as to personal estate, a mere draught; for though it has neither his name nor feal to it, nor witnesses present at its publication, yet the writing may operate as a testament of chattels, if fufficient proof can be had that it is the testator's hand writing, Godolphin, p. 1. c. 21. s. 2. and fo it would have done as to lands, before the statute of frauds, Bate's case, Sid. 362. Anon. 2 Leon 35. See Moore, 177. Dyer, 66. 2 Leon. p. 4. 159. 166. 1 Mod. 117. 1 Ca. Ch. 248. Finch, 195. 2 Comyns's Rep. 451. Swinb. part 7. f. 16. 5. Cary v. Atkins, 2 Bro. Ch. Rep. 1 P.Wms. 10. 529.

34 H. 8 (t) (4). And in wills where the devises are several and distinct, the perfect is not to be hurt by the imperfect, although the testator die before the whole is finished; for perseverance, and not mutation of will, is to be presumed (u) (5).

(4) Nash v. Edmunds, Cro. -Eliz. 150.

(5) Butler and Baker's case, 3 Co. 31. b.

- (1) It feems, from the opinion of the court in Nash v. Edmunds, that the will should not take effect, unless written by the command of the devisor, or by his confent, and by the person appointed by the devisor for such purpose. Q. If the consent of the devisor shall be inferred from the will being afterwards read over to him? See Powell's Law of Devises, p. 27.
- (u) It was necessary, however, that the particular devise should be perfect, and put in writing, during the life of the devisor, Cæsar and Like's case, Dyer, 72. note 2.

SECTION VII.

AND wherever there is a demand in law or equity, there must be a certainty of the thing demanded (x), to be adjudged

(x) This rule is applicable to most cases; but there may be circumstances under which the strict application

(1) Hob. 174. 1 Sid. 270. Bromle, v. Jefferies, Pre. R. 138 2 Vern. 415. Anon. 5 Vin. Ab. 521. pl. 32. 2 Eq. Ca. Ab. 45. pl. 10. Buxton v. Lifter 3 Atk. 386. adjudged or decreed, or at least a mean to reduce it to a certainty (1); for, otherwise, the court will not know how to give judgment. The agreement must also be fixed and settled, and not wavering and revocable; or else the representative will not be bound by it, if not perfected before the parties death. But here are se-

cation of it would lead to injuffice; and, in fuch cases, courts of equity will endeavour to enforce the specific performance of the agreement, notwithstanding the loofe manner in which the terms of it may be expressed. Thus in Allen v. Harding, 2 E. Ca. Ab. 17. pl. 6. the defendant bing curate of Newcastle, had covenanted to build a house on the glebe land; which he afterwards refusing to do, the plaintiff brought his bill for a specific performance. The defendant infifted on the uncertainty of the agreement, it specifying neither the time when the house was to be built, nor what fort of a house it should be, and therefore founding only in damages. But per Lord Chancellor, Who can the damages go to? furely to B. to whom the covenant was made. His Lordship then observed, that the covenant was defigned for the benefit of the church; and therefore, if it could possibly be specifically performed, it ought, and decreed a convenient house to be built; and for that purpose, each fide to choose two commissioners, neighbouring gentlemen; and if they could not agree, then to refort to the ordinary of the diocefe to fettle the matter between them. See also Moseley v. Virgin, 3Vez. Jun. 184.

veral

(2) Rector of Chidington's case, 1 Rep. 155.

veral diversities to be observed (2): 1st, Between a covenant, or other agreement, which is perfect and complete, although to take effect in possession upon a future matter precedent; and a covenant and agreement incomplete and imperfect, which is to be reduced to its perfection by future matter ex post facto; for, in the one case, the interest and estate in the land is prefently vested, but in the other not; and therefore, it must be made perfect in the lifetime of the parties, or elfe will not bind; for the lien never vefting in the ancestor or testator, cannot descend upon the heir, or devolve to the executor. As, if land is rendered by fine to one and his heirs, there the land is bound, fo that he cannot alter or defeat it: and though he, to whom the render is made, dies before the execution, yet his heir shall have it (y). But if a man devises land to one and his heirs, and after the devifee dies before the devisor, the devise is void; for the will

⁽y) A fine is now confidered as completed upon the entry of the king's filver; and if any of the cognizors die before the remaining parts of the fine are perfected, still the fine shall operate, 5 Co. 39. a. Farmer's case, Hob. 330. Cruise on Fines, 47, 48. See 2 Inst. 517.

(2) Brett v.
Rigden, Plow.
345.
Steed v. Berrier,
1 Freem. 292,
293.
Hartopp's cafe,
Cro. Eliz. 243.
Sympfon v.
Hornfby,
Pre. Ch. 429.
2 Vern. 722.
White v. White,
flated in a note
to Ambrofe v.
Hodgfon,
Dougl. Rep.
344.

was alterable at the pleasure of the devisor, and the heir cannot be a purchaser; because, by the words, he is appointed to take by way of limitation (2). 2dly, Between a covenant, or agreement executory, and a grant or bargain which must take effect, and change the property of the thing granted, either presently and at once, or depending upon fomewhat that shall reduce it to its full effect; and therefore, if A. grant all his woods and underwoods growing upon all his manor which could conveniently be spared, without prejudice to the estate of his manor, this grant is void; because it is uncertain which trees may be spared, and which not, and there is no person appointed to determine it (z). But if it were a covenant

(2) If one possessed of a term for 2000 years, leases the land to A. without mentioning any term, the grant is void for uncertainty, Kersley v. Duck, 2 Vern. 684. But if tenant in see lease for so many years as J. S. should name, it would be good, Stukeley v. Butler, Hob. 174. So if a man, having six horses in his stable, grants one of them, but does not specify which, A. in such case may choose, and when he has made his election, the grant is good; but if he die before he has made his election, the grant will never be good, Shepherd's Touchstone, p. 251. And the same reasons that

venant or agreement executory, he might have taken trees by force of it, and have justified specially; averring, that they might be spared, and put himself upon the jury for it (3).

(3) Stukeley v. Butler, Hob. 174-

that prove, that where the election creates the interest, nothing passes till election, prove also, that where no election can be made, no interest can arise, Hob. 174.

SECTION VIII.

RUT besides the bare words of the agreement, the common law, to prevent imposition, ordained certain ceremonies, where an interest was to pass; and therefore appointed livery for things corporeal, and a deed for things incorporeal. Yet, in equity, where there was a confideration, the want of ceremonies was not regarded (1). However, in former times, this (1) See c. 1. court was very cautious of relieving bare parol agreements for lands, not figned

by

by the parties, nor any money paid (a); although they would fometimes give the party fatisfaction for the loss he had sustained (b). And now, by the statute of 29 Car. 2. cap. 3. if an agreement be by parol, or not signed by the parties (c), or somebody

- (a) But if the agreement, though parol, was in part performed by one of the parties, it is faid equity would decree a specific performance, Marquis of Normandy v. Duke of Devonshire, 2 Freem. 216.
- (b) In Denton v. Stewart, MSS. 4th July 1786, the Master of the Rolls referred it to a master, to inquire what damages plaintiss had sustained by the desendant having put it out of his power to perform his agreement: but I am aware of no other case in which such an order has been made; the usual decree being, either a specific performance, or an issue quantum damnissicatus.
- (c) It was determined, very soon after the passing of the statute of frauds, that an agreement, signed by one of the parties, should be binding on the party signing it, Hatton v. Gray, 2 Ch. Ca. 164. and in Sir James Lowther v. Carill, 1 Vern. 221. the court appears to have thought, that one of the parties making alterations in the draught, and sending it to the other to execute, who did execute it, would bring the case out of the statute. But the authority of this latter decision seems to be done away by Lord Macclessield's decree in Hawkins v. Holmes, 1 P.Wms, 770. by which his Lordship held, that unless in some particular cases, where

fomebody lawfully authorifed by them (2), if fuch agreement be not confessed in the answer.

(2) Bawdes v. Amherst, Pre. Ch. 402.

where there has been an execution of the contract, by entering upon and improving the premises, the party's figning the agreement is absolutely necessary for completing it, and that to put a different construction upon it would be to repeal it; and his Lordship therefore held, that the defendant having altered the draught with his own hand, was not a figning to take it out of the statute; though the vendor afterwards executed the conveyance, and caused it to be registered. But this question received more particular consideration in the case of Stokes v. Moore, Serjeant's Inn Hall, March r. 1786, which was a fuit for the specific performance of an agreement for the renewal of the leafe of a house from Moore and his wife to Stokes. There having been some difficulty about the terms of the renewal, they at length came to an agreement; and defendant Moore being called upon to name fome person to prepare the leafe, he named a Mr. S. for that purpose, and wrote certain instructions, from which the lease was to be prepared in these words, viz. "The lease renewed; Mr. Stokes to pay the king's tax; also to pay Moore 24l. a-year, half yearly; Mr. Stokes to keep the house in good tenantable repair, &c." To this bill the defendants pleaded the flatute of frauds; the plea was ordered to stand for an answer, with liberty to except; and the defendants having by their answer admitted the written instructions, one question made on the hearing of the cause was, whether there was a sufficient fignature by Moore to take this agreement out of the statute; and for the plaintiff it was infifted, that Moore having written his own name in the body of thefe in-Vol. I. ffructions.

answer, it cannot be carried into execution. But where, in his answer, he allows the bargain to be complete, and does not insist on any fraud (d), there can be no danger

flructions, would amount to fuch a fignature; and that it did not fignify whether the name was to be found at the bottom, or the top, or in the body, of the instrument, Welford v. Beazley, 3 Atk. 503. And it was likened to the cases upon wills, in which it had been determined, that the testator's writing his name in the introduction to the will, was a good figning within the statute: on the other side, Hawkins v. Holmes was relied upon. The Lord Chief Baron and Mr. Baron Eyre, delivered their opinions, and the other Barons agreed, that the fignature required by the statute is to have the effect of giving authenticity to the whole of the instrument; and where the name is inferted in such a manner as to have that effect, it did not much fignify in what part of the instrument it was to be found, as in the formal introduction to a will. But it could not be imagined, that a name inferted in the body of an instrument, and applicable to particular purposes, could amount to such an authentication as the statute required; upon which, as well as upon another ground, the bill was difmiffed. See Mr. Cox's Note (1) to Hawkins v. Holmes, 1 P. Wms. 770.

(a) If a defendant confess the agreement charged in the bill, there is certainly no danger of fraud or perjury in decreeing the performance of such agreement. But it is of confiderable importance to determine whether the defendant be bound to confess or deny a merely parol agreement not alledged to be in any part

danger of perjury; because he himself has taken away the necessity of proving it (3).

(3) Cio; ston v. Bayne, Pre. Ch. 208;

So, Pre. Ch. 208; Symondson v. Tweed, Pre. Ch. 374. See also Attorney General v. Day, 1 Vez. 221. Poter v. Potter, 1 Vez. 441. Gunter v. Halsey, Amb. 586.

part executed? or, if he do confess it, whether he may not insist on the statute, in bar of the performance of it?

The cases, upon the first point, are many in number, various in their circumstances, and the decisions upon them not immediately reconcileable. I shall, therefore, confider them in their principle rather than in detail. They who infift that the defendant is bound to confess or deny the agreement alledged, principally rely on the rule of equity, that the defendant is bound to confess or deny all facts which, if confessed, would give the plaintiff a claim or title to the relief prayed; and that as equity would decree a parol agreement, if confessed, the defendant must confess or deny it. It is certainly a general rule in equity, that the defendant shall discover whatever is material to the justice of the plaintiff's case; but in applying this rule to the case of a parol agreement, it is previously material to ascertain, whether the statute of frauds has not in such case relieved. the defendant from this general obligation. The prevention of frauds and perjuries is the declared object of the flatute; and the decreeing of a parol agreement, when confessed by the defendant, and the statute not infifted on, is evidently confiftent with fuch object; nam quisque renuntiare potest juri pro se introducto. But if the defendant be bound to confess or deny the parol agreement, his answer must be either liable to contradiction, or not liable to contradiction. If the defendant's answer be liable to contradiction by evi-N 2 dence.

(4) Betcher v. Staples, 1 Vern.

So, if it be carried into execution by one of the parties (4), as by delivering poffession.

363.
Pyke v. Williams, 2Vern. 455. Foveroft v. Lifter, cited in Pyke v. Williams. Lockey v. Lockey, Pre. Ch. 510. Projd v. Buckland, 2 Freem. 268. Gunter v. Halfey, Amb. 586. Earl of Aylestoid's cafe, 2 Stra. 783. Binfted v. Colemon, Bunb. 65. Borrelt v. Gometara, Bunb. 94. Savage v. Fofter, 9 Mod. 37. Owen v. Davis, 1Vez. 82. Attorney General v. Day, 1Vez. 221. Taylor v. Beech, 1Vez. 297. Potter v. Potter, 1Vez. 441. Laeon v. Mertins, 3 Atic. 4. Whitbread v. Brockhurt, 1 Bro. Rep. 404. Whitchurch v. Bevis, 2 Bro. R. 566. Den on v. Stewart, MSS. 4th July, 1786.

dence aliunde, the evil arising from contradictory evidence, which the flatute proposed to guard against, would necessarily result. If the defendant's answer be not liable to contradiction by evidence aliunde, the rule would furnish a temptation to perjury, by giving the defendant a certain interest in denying the agreement; fince, if he confessed it, he would be bound to perform it. If the defendant be bound to confess or deny the parol agreement infifted on by the plaintiff, one of the above confequences must necessarily ensue; which of the two is likely to prove the most mifchievous, were, perhaps, difficult to decide: for though the perjury, which might take place if contradictory evidence were allowed, is an evil of confiderable fize, yet the defendant's being liable to be contradicted, might operate as a check on his falfely denving that which was truly alledged. It feems, however, to have been the opinion of Lord Chancellor Thurlow, that the only effect of the statute is to preclude the plaintiff from reforting to evidence aliunde, for the purpole of fubflantiating a parol agreement denied by the defendant, Whitchurch v. Bevis, 2 Bro. Rep. 566. See also Child v. Godolphin, therein cited by Lord C. Thurlow. This rule, which, when the agreement is in no part performed, renders the defendant's answer conclusive, may certainly, in some instances, prevent fraud; but it is possible, that, in other instances, it may encourage

fession, and such execution be accepted by the other, he that accepts it must perform his part; for where there is a performance,

courage perjury. To strike out the mean by which the spirit of the statute might be preserved without entrenching on its provisions, is certainly difficult, perhaps impossible; for it is clear that the facute intended to prevent fraud as well as perjury; and it cannot be denied, that the refusing to execute an agreement deliberately and fairly entered into, merely because it was not reduced into writing, is a fraud, which a court of conscionce ought to discourage; but which it cannot discourage, if of such an agreement it cannot enforce a discovery. It would ill become me to pursue this point further; the difficulties which I have stated are probably sufficient to explain and justify the contrariety of opinion which has prevailed upon It remains, however, to consider, whether a defendant, having confessed the agreement alledged, can protect himself from the performance of it, by infisting on the statute? This, which is also vexata quæstio, is almost immediately dependant on the former point: for when Lord Macclesfield, in Child v. Godolphin, held, that the defendant was bound to confess or deny the agreement, it feems to have been a necessary confequence, that if the defendant confessed the agreement, he should not be allowed to avail himself of the statute; for if he might avail himself of the statute, cui bono compel him to confess or deny the agreement? See Cottington v. Fletcher, 2 Atk. 155. Lacon v. Martins, 3 Atk. r. But fee Kingfman v. Kingfman, cited in 10 Mod. 404. But if the defendant be not bound to confess or deny the agreement, it must be in respect of

formance, the evidence of the bargain does not lie merely upon the words, but upon the fact performed (e). And it is uncon-

the statute affording him a good defence against the performance of it; and if fuch be the effect of the statute, it should seem to be immaterial whether he set up fuch defence in the shape of a plea, or by his anfwer; the flatute not having prescribed any mode in particular by which a defendant must avail himself See Stewart v. Careless, cited in of fuch defence. Whitchurch v. Bevis. It may be material, here to observe, that even the cases which most favour the opinion that courts of equity may compel the performance, and confequently the discovery of merely parol agreements, require, that the terms of fuch agreement should be clear, definite, and conclusive; and therefore, if the court can collect the jus deliberandi, or locus pænitentiæ, to have been referved, the contract shall not be considered as complete till reduced into writing, or in part performed, Whaley . Bagnel, 6 Bro. P. C. 45. Whitchurch v. Bevis, 2 Bro. Rep. - 566.

(e) To allow a statute, having the prevention of frauds for its object, to be interposed in bar of the performance of a parol agreement, in part performed, were evidently to encourage one of the mischiefs which the legislature intended to prevent. It is therefore an established rule, that a parol agreement, in part performed, is not within the provisions of the statute. See Whitchurch v. Bevis. This exception, however, leads to considerable difficulties. Part performance is clearly a relative term; and in stating acts of part performance,

unconscionable, that the party, that has received the advantage, should be admitted to say, that such contract was never

performance, the plaintiff must necessarily state the agreement to which he refers. The defendant, by the above rule, seems bound to consider the case stated as out of the statute: supposing him, however, to deny the acts alledged to have been done in part performance, would he be bound to admit or deny the parol agreement referred to? or admitting such acts to have been done, supposing him to deny the agreement, or the terms of the agreement, to which such acts are referred in part performance; would the plaintiff, in the latter case, be at liberty to resort to evidence aliunde, in order to substantiate such parol agreement?

In the first case, I conceive that the plaintiff would be intitled to go into evidence, to shew that the acts alledged were actually done; and if he fucceeded in this particular, it feems to follow as a necessary consequence, that he might prove the agreement to which fuch acts referred: but suppose the plaintiff not to be able to prove the agreement, the terms of it being confined to his and the defendant's knowledge, would he be intitled to a discovery from the defendant? If the defendant be bound to discover such agreement, merely because the plaintiff had alledged it to have been in part performed, the plaintiff might, by alledging what was false, be placed in a better fituation than he would have been in if he had stated the truth. But it would be difficult, in a court of conscience, to maintain, that falsehood can intitle to fuch an advantage: for the purpose of investigating the point, I will, however, assume, agreeably to

never made. So, if the figning by the other party, or reducing the agreement into writing, be prevented by fraud, it may be good (5). And although parol agree-

(5) Sir G. Maxwell v. Montacute, Pre. Ch. 526.

See also Sellack v. Harris, 5 Vin. Ab. 521. pl. 31. Thynn v. Thynn, 1 Vern. 296.

the decision in the E. of Aylesford's case, 2 Stra. 783. and the opinion of Lord Thurlow in Whitchurch v. Bevis, that the defendant is bound to discover whether he entered into fuch parol agreement or not. Suppose the defendant to have confessed the agreement, denying, however, the acts alledged in part performance of it. Where plaintiff alledges part performance, it is affumed, that defendant cannot plead the statute; and when the statute cannot be pleaded, it should feem that it cannot be infifted upon by the answer: but where the statute is not infisted on, it seems admitted, that a parol agreement confessed shall be decreed to be performed: it would follow in the above supposed case. that the plaintiff would be relieved from the necessity of proving the acts alledged in part performance; for cui bono put him upon proving the part performance of an agreement confessed, the admission of the agreement being alone a sufficient circumstance to entitle him to a decree? This advantage might encourage the plaintiff untruly to alledge a part performance; but I know no mean by which the objection can be obviated; for if the agreement be in part performed, it is but reasonable that it should be completed, and to that the defendant's discovery may be material; and whether it was or was not in part performed, is a point which clearly the defendant may establish by evidence aliunde. I have adverted to another difficulty which

agreements are bound by the statute, and agreements are not to be part parol, and part in writing; yet a deposit, or collateral

may arise from the rule, than an agreement in part performed is not within the statute of frauds. The case I stated supposes the defendant to admit certain acts to have been done; but denies that they were done in part performance of any agreement; or insists that the terms of the agreement, of which they were done in part performance, were not such as stated in the bill.

There are various acts which are confidered to amount to a part performance of a parol agreement, and fome of them are of a nature which necessarily implies fome agreement; as where a man is let into possession, the possession must be referred to some title; but to what can it, unless to the agreement of one having right to confer a title? In fuch a case it might be confistent with the provisions of the statute to allow evidence, to explain the agreement which led to the possession, though the defendant denied that there was any agreement upon the subject; but if the act alledged in part performance be of a more doubtful nature, as retaining possession after the expiration of a lease: in fuch case, if the defendant denied having agreed to grant a new leafe, or to grant it on the terms alledged, it feems very difficult to determine, whether the plaintiff ought, or ought not, in respect of the admission of the acts alledged, to be allowed to prove a parol agreement by evidence aliunde. See Mortimer v. Ordhard, 2 Vez. Jun. 243.

lateral security for the performance of the written agreement, is not within the purview of the statute (6).

(6) Hales v. purview of the statute (6).

617. Ruffell v. Ruffell, 1 Bro. Rep. 269. Huxford v. Carpenter, 19th April 1785, MSS. but see Brandon v. Bowles, contra. 25 Nov. 1713.

This note is already drawn out to a greater length than I intended; and as the enumeration of difficulties, without fuggesting the means to remove or lessen them, is little likely to be acceptable, I shall close this note with a few distinctions upon the question, what acts amount to a part performance? The general rule is, that the acts must be such as could be done with no other view or defign than to perform the agreement, and not fuch as are merely introductory, or ancillary to it, Gunter v. Halfey, Amb. 586. Whitbread v. Brockhurst, I Bro. Rep. 412. See Wills v. Sradling, 3 Vez. Jun. 379. Pyon v. Blackburn, 3 Vez. Jun. 34. giving of possession is therefore to be considered as an act of part performance, Stewart v. Denton, MSS. 4th July 1786; but giving directions for conveyances, and going to view the estate, are not, Clerk v. Wright, 1 Atk. 12. Whaley v. Bagnal, 6 Bro. P. C. 45. Payment of money is also said to be an act of part performance, Lacon v. Martins, 3 Atk. 4. But it feems that payment of a fum, by way of earnest, is not, Seagood v. Meale, Pre. Ch. 560. Lord Pengall v. Rofs, 2 Eq. Ca. Ab. 46. pl. 12. Simmons v. Cornelius, 1 Ch. Rep. 128. But see Voll v. Smith, 3 Ch. Rep. 16. & Anon. 2 Freem. 128.

SECTION IX.

So where, in confideration of the agreement, the plaintiff had expended great fums of money about the premises, and charged that part of the agreement was, that the agreement should be put into writing (f); there is a difference to be taken, where the money was laid out in lasting improvements, and where for

(f) In Leak v. Morrice, 2 Ch. Ca. 135. the Lord Keeper over-ruled a plea of the statute of frauds, on the ground of its having been agreed, that the terms of the contract should be put into writing; and in Hollis v. Whiting, I Vern. 151. the want/of fuch circumstance was held fatal to the agreement, though the plaintiff alledged that he had expended confiderable fums on the premiles on the faith of it. But in the case of Seagood v. Meale, Pre. Ch. 561/ it is faid, that "where a man, on promise of a lease to be made to him, lays out money on improvements, he shall oblige the lessor afterwards to execute the leafe, because it was executed on the part of the leffee." This dictum is fanctioned by the spirit of equity, and seems to do away the decifions which require, even under the circumstance of the premifes being improved, an averment of its being part of the parol agreement that it should be reduced into writing.

(1) Deane v. Izard, 1 Vern. 159-Seagood v. Meale, Pre. Ch. 561. See alfo Savage v. Taylor, Forrefter, 239.

fancy or humour (g) (1). And it is clear that a bill would hold, so far as to be restored to the consideration money expended in valuable improvements; for a lease, though void for want of legal ceremonies, yet is a sufficient colour to possess (b). But the difficulty seems to be, that the act makes void the estate, but does not say that the agreement itself shall be void. So that, possibly, a man may recover damages for the non-performance of it, and then there is no doubt to decree it in equity (i). So where the plaintist, pursuant to a parol agreement for a building

- (§) The principle of this distinction extends to purchasers for valuable consideration, and without notice of an adverse title, Edlin v. Bateley, 2 Lev. 152. Thomlinson v. Smith, Finch, 378.
- (b) This rule feems now to prevail, even in courts of law; it having been held, that a plaintiff in ejectment shall not be allowed to recover against such an equitable title, as would be specifically decreed in equity, Weakly ex dem. Yeav. Bucknell, Cowp. 473. But it may be material to remark, that on this decision being referred to in Lowther v. Andover, 1 Bro. Rep. 397. Lord Thurlow, C. expressed his surprise, and doubted the law of it.
- (i) It is certainly a general rule, that courts of equity will, under particular circumstances, enforce the

ing leafe, proceeded to pull down part, and build part, and before any leafe executed, the owner of the foil died, equity will decree a building lease to be made according to the agreement (2). But the execution in part must be valuable and meritorious. Nor is giving 5s. or 10s. earnest, &c. sufficient (3); but, in these cases, an action at law must be brought, and damages only recovered. For when this court does affift the common law, and enforce the performance of the agreement in specie, it does it upon important reasons, viz. when otherwise, there would be a great burthen and penalty upon the party, if, having performed part, by which he himself has a loss, and the other a benefit, he should not have a reciprocal performance (4).

(2) Foxoroft v:
Lifter, cited in
Pike v. Williams, 2 Vein.
456.
(3) Seagood
v. Meale, Pre.
Ch. 560.
Pengall v. Rofs,
2 Eq. Ab. 46.
pl. 12.
Simmons v.
Cornelius,
1 Ch. Rep.
128
See f. 8.
note (c).

(4) Serc 1. 1. 5. c. 3 f. 1.

the specific performance of agreements, for the nonperformance of which the party would be intitled to damages at law: but as the decreeing of specific performance is in the discretion of the court, it must not be considered as an universal rule; for if the plaintiff's title be involved in difficulties which cannot be immediately removed, equity will not compel the defendant to take a conveyance, though, perhaps, he might at law be subject to damages for not completing his purchase. See Marlow v. Smith, 2 P. Wms. 198. Lyddel v. Weston, 2 Atk. 19. Shapland v. Smith, 1 Bro. R. 75. Cooper v. Denne, 1 Vez. Jun. 565.

SECTION X.

(1) Sect. 4.

THERE is another branch of the statute (1), which restrains marriage agreements, not made in writing, and signed by the party (j). But an agreement by letter (k) takes it out of the statute (2); for this is a writing signed by

(2) Bird v.
Bloffe,
2 Ventris, 361.
Moor v. Hart,
• Ch. R. 147.

2 Ch. R. 147. 1 Vern. 110. Wanckford v. Fotherley, 2 Vern. 322. Anon. Skin. 142.

- (j) The statute does not extend to mutual promises to marry, but relates only to contracts in consideration of marriage, Cooke v. Baker, Buller's Ni. Pri. 280. 4to ed.
- (k) A letter not only takes an agreement in confideration of marriage out of the flatute, but also, as before observed, agreements respecting lands, &c. Ford v. Compton, 2 Bro. Ch. R. 32. Tawney v. Crowther, 3 Bro. C. R. 318.: but whenever a letter is relied on as evidence of an agreement, it must be stamped before it can be read, Ford v. Compton. It must also distinctly furnish the terms of the agreement, Seagood v. Meale, Pre. Ch. 560. Str. 426. Clark v. Wright, 1 Atk.

him. As to that clause, which relates to the writing, signing, and attesting of wills (1), it is said, that the signing of the

1 Atk. 12.; Brodie v. S. Paul, 1 Vez. Jun. 326. or it must at least refer to some written instrument, in which the terms are fet forth, Tawney v. Crowther. It must likewise appear, that the other party accepted fuch terms, and acted in contemplation of them: if. therefore, the husband was, at the time of the marriage, ignorant of the promise contained in the letter, equity will not decree upon it, Ayliffe v. Tracey, 2 P. Wms. 65. Neither will equity decree a portion upon a promife in a letter, if the defendant appear in the fame letter to have endeavoured to prevent the marriage, though he was afterwards prefent at it, Douglas v. Vincent, 2 Vern. 202. Q. Whether courts of equity will decree an agreement entered into by letter, if a deed appear to have been afterwards framed, but not executed, varying the terms expressed in the letter? See Cokes v. Mascal, 2 Vern. 34. or if the terms be varied by parol? See Jordan v. Sawkins, 3 Bro. Rep. 388. And as a letter, fetting forth the terms of an agreement, takes the agreement out of the statute, it being a fufficient figning; fo, it feems, it is a fufficient figning, if a person, knowing the contents, subscribe the deed as a witness only, Welford v. Beazeley, 3 Atk. 503.

(1) The clause referred to is the 5th section of the statute, which enacts, that "all devises and bequests of any lands or tenements, deviseable either by sorce of the statute of wills, or by this statute, or by force of the custom of Kent, or the custom of any borough, or any other particular custom, shall be in writing, and signed

the devisor, in the presence of the witnesses, is not necessary. And this statute, and

figned by the party fo devising the fame, or by some other person in his presence, and by his express directions, and shall be attested and subscribed in the prefence of the faid devisor, by three or four credible witnesses, or else they shall be utterly void, and of no effect." See Wild's case, 6 Rep. 16. 17. as to the reafon why devises were not allowed, except by special custom, by the common law. The above clause requiring the devise to be figned by the testator, or by some other person in his presence, and by his express direction, has frequently led to the question, what shall be construed a figning? The first case, in which this question was raifed, was Lemayne v. Stanley, 3 Lev. 1. 1 Eq. Ca. Ab. 403. in which case it was determined, that if the testator write the will with his own hand, though he does not subscribe his name, but feals and publishes it, and three witnesses subscribe their names in his prefence, it is a good will; for his name being written in the will, it is a fufficient figning, and the statute does not direct, whether it shall be at the top, bottom, &c. But from the case of Right lessee of Cater v. Price, Dougl. 220. it may be inferred, that the above decifion will apply only to those cases where the testator appears to have confidered fuch figning fufficient to fupport his will, and not to those, where the testator appears to have intended to fign the instrument in form. In the case of Right v. Price, the will was prepared in five sheets, and a seal affixed to the last, and the form of attestation written upon it; and the will was read over to the testator, who set his mark to the two first sheets, and attempted to set it to the third, but being unable,

and that of intestates, were drawn up by C. J. Hale, and the Judge of the Prerogative

unable, from the weakness of his hand, he said he could not do it, but that it was his will; and on the following day, being asked if he would fign his will, he faid he would, and attempted to fign the two remaining sheets, but was not able. Lord Mansfield observed, that "the testator, when he signed the two first sheets, had an intention of figning the others, but was not able. He therefore did not mean the fignature of the two first as the signature of the whole will: there never was a fignature of the whole." The next doubt that occurred upon this point was, whether the testator sealing his will was not a signing within the flatute? and in Warneford v. Warneford, 2 Stra. 764. Lord Raymond is reported to have held, that it was; and of the same opinion three of the judges appear to have been, in Lemayne v. Stanley: but in Smith v. Evans, 1 Wilf. 313. fuch opinion was faid to be very strange doctrine; for that if it were so, it would be easy for one person to forge any man's will, by only forging the names of any two obscure persons dead; for he would have no occasion to forge the testator's hand. And they faid, "if the fame thing should come in question again, they should not hold, that sealing a will only was a fufficient figning within the statute." But in the case of Gryle v. Gryle, 2 Atk. 176. Lord Hardwicke feems to have thought, that fealing without figning in the presence of a third witness, the will having been duly executed in the presence of two, would have been fufficient to make it a good will. Upon the attestation of a will, many questions have also arisen. The first feems to have been, whether the witnesses VOL. I.

rogative Courts (m). And there are many things in them that are according to the plan

must attest the signing by the testator? and, upon this point, the statute not requiring the testator to fign his will in the presence of the witnesses, it has been held fufficient, if the testator acknowledge to the witnesses that the name is his, Stonehouse v. Evelyn, 3 P. Wms. Grayson v. Atkinson, 2 Vez. 454. and Smith v. Codron, 7th July 1732. cited in Grayson v. Atkin-See also Dormer v. Thurland, 2 P. Wms. 510. See also Peal v. Ongley, Comyn's Rep. 197. Ellis v. Smith, 1 Vez. Jun. 11. The next question respecting . the attestation was, what shall be construed a figning in the presence of the testator? and upon this point, which first came into consideration in Longford v. Eyre, 1 P. Wms. 740. Lord Macclesfield held, that " the bare subscribing of a will by the witnesses in the fame room, did not necessarily imply it to be in the testator's presence; for it might be in a corner of the room, in a clandestine, fraudulent way, and then it would not be a subscribing by the witness in the testator's presence, merely because in the same room; but that here, it being fworn by the witness, that he subscribed the will at the request of the testatrix, and in the fame room, this could not be fraudulent, and was therefore well enough." So in the cafe of Shires v. Glascock, 2 Salk. 688. the testator having defired the witnesses to go into another room, seven yards distant, to attest it, in which room there was a window broken, through which the testator might have feen, the atteftation was held good; for that it was enough that the testator might see the witnesses figning, and that it was not necessary that he should actually

plan of the civil law; and the constructions have been accordingly (3). And there

(3) Gilb. Rep. 261.

actually see them. See also Davy and Nicholas v. Smith, 3 Salk. 395. And Lord Thurlow, C. in Caffon v. Dade, 1 Bro. Ch. R. 99. relying upon the authority of Shires v. Glascock, inclined to think a will well attested, where the testatrix could fee the witnesses through the window of her carriage, and of the attorney's office. But the above cases turned upon the circumstance of the testator being in a situation which allowed of his feeing the witnesses fign; if, therefore, he be in a position in which he cannot fee the figning, it feems fuch attestation would not be a compliance with the statute, Eccleston v. Pally. Carth. 79. Holt's Rep. 222. Broderick v. Broderick, 1 P. Wms. 239. Machell v. Temple, 2 Show. 288. And in the case of Hands v. James, Comyns's R. 531. it was determined, that the question, whether present or not, was a fact for the consideration of the jury upon all the circumstances of the case. See also Croft v. Pawlett, Stra. 1109. It seems also to have been a question, whether the witnesses should not attest the will in the presence of each other? But it was determined, very foon after the statute, that though the witnesses must all see the testator sign, or acknowledge the figning, yet-that they may do it at different times, Anon. 2 Ch. Ca. 109. Freem. 486. Cook v. Parson, Pre. Ch. 185. Jones v. Lake, cited 2 Atk. 177. Bond v. Sewell, 3 Burr. R. 1773. may be proper, in this place, to observe, that as the object of this clause of the statute of frauds was to prevent those impositions which had been practifed on perfons in extremis, that it is the duty of persons attesting 02 wills

(4) Watts v. Ball, 1 P. Wms. there is the same rule of property in equity as in law (4); and the same exposition of the

wills of lands, to be fatisfied as to the fanity of the teftator; for unless he be fane, he cannot be faid to have a disposing mind, which is of the very essence of a will; and on this account, the fanity of the testator must be proved; and therefore, if a bill be brought to establish a will against an heir, all the witnesses, if living, must be examined as to the fanity of the testator, Ogle v. Cook, 1 Vez. 177. Grayfon v. Atkinfon, 2 Vez. 454. Townsend v. Ives, I Wilson's Rep. 216. And so strictly do courts of equity infift upon this rule, that they will not dispense with it, though the heir at law, by his answer, state that he believes the will to have been duly made, &c. Potter v. Potter, 1 Vez. 274.; and a compliance with it is the more necessary, as the court will fet aside a will, on account of the infanity, even after 40 years possession under it, and that, too, against a purchaser, Squire v. Pershall, 8 Vin. Ab. 169. pl. 13. It may be material, in this place also, to confider who are intended by credible witnesses. "The epithet credible," fays Lord Mansfield, " has a clear precise meaning: it is not a term of art, appropriated only to legal notions, but has a fignification univerfally received. It is never used as synonimous to competent. When applied to testimony, it presupposes the evidence given," Wyndham v. Chetwynd, 1 Burrow's R. 417. But it feems, that formerly "the judges were very strict in regard to the credibility of the witnesses; for they would not allow any legatee, nor, by confequence, a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devife, as being too deeply concerned in interest not to wifh

the statute law (n). And the rather, because it is a statute of frauds, which it is the

wish the establishment of the will; for if it were established, he gained a security for his legacy or debt; whereas, otherwife, he had no claim but on the perfonal affets," 2 Bla. Com. 377. Helier v. Jenings, I Freem. 510. Comyns's Rep. 91. I Lord Raymond, 505. Carth. 514. (See also Lord Mansfield's observations on this case, in Wyndham v. Chetwynd.) Holdfast ex dem. Anstey v. Dowsing, 2 Str. 1253. "Thefe determinations, however, alarmed many purchasers and creditors, and threatened to shake most of the titles in the kingdom that depended on devises by will. For, if the will was attested by a servant to whom wages were due, by the apothecary or attorney, whose very attendance made them creditors, or by the minister of the parish, who had any demand for tithes or ecclefiastical dues (and these are the persons most likely to be present in the testator's last illness); and if, in fuch case, the testator had charged his real estate with the payment of his debts, the whole will, and every disposition therein, so far as related to real property, were held to be utterly void. This occasioned. the statute 25 G. 2. c. 6. which restored both the competency and credit of fuch legatees, by declaring void all legacies given to witnesses, and thereby removing all possibility of their interest affecting their testimony. The same statute likewise established the competency of creditors, by directing the testimony of all fuch creditors to be admitted; but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom fuch will shall be contested; and accordingly,

the proper business and jurisdiction of a court of equity to suppress.

accordingly, in Wyndham v. Chetwynd, 1 Burrows, 414. the testimony of three witnesses, who were creditors, was held to be fufficiently credible, though the land was charged with payment of debts; and the reasons given on the former determinations were faid to be infufficient," 2 Bla. Com. 377. 378. and in the cafe of Brograve v. Winder, 2 Vez. Jun. 632. a witness not interested at the time of the execution of the will, but interested at the time of his examination, was held to be competent. It may be proper here to remark, that a codicil, though not attested, has, in some cases, been considered as part of the will, so as to charge real estate, as where the will, duly attested, charged real estate with the payment of legacies; it was held, that legacies, bequeathed by codicil not attested, were well charged by the real estate, Brudenell v. Boughton, 2 Atk. 268. Hannis v. Packer, 556. Habergham v. Vincent, 2 Vez. Jun. 204. Buckeridge v. Ingram, 2 Vez. Jun. 665. because they were not devised out of land like a rent, but only fecured by land which was before well devised, Hyde v. Hyde, I Eq. Ca. Ab. 409. Q. Therefore, if the bequest of a legacy by an unattested codicil, can be incorporated in the will so as to charge the real estate, if the personal estate be by the will expressly exempted, and the real estate be made primarily applicable to the payment of legacies?

(m) "The statute of frauds is often supposed to have been made upon great consideration: on an attentive perusal, however, it will not appear to have been very accurately penned. It seems to be universally understood to be the meaning of the statute, that the testator

must sign in the presence of the subscribing witnesses; yet there is no express provision for that purpose in the clause (f. 5.) describing the solemnities which are to attend the execution. It is as univerfally understood, that an express written revocation must be executed with the same solemnities as an original will; but in the clause (f. 6.) relative to such revocations, the subfcription of the witnesses is not directed; while, on the other hand, the figning by the testator in their presence, is, in fuch case, expressly prescribed." See Mr. Douglas's note to his report of Right v. Price. The first part of this observation seems also to have occurred to Mr. Justice Fortescue Aland, in Stonehouse v. Evelyn. 3 P.Wms. 254. See also Onions v. Tryer, 1 P.Wms. 344. As to implied revocations, fee Goodtitle v. Otway, 7 T. Rep. 415.

(n) And therefore equity, in the devise of a trust, will require a strict observance of all those requisites which are prescribed by the statute as necessary to devises of land, Wagstaff v. Wagstaff, 2 P. Wms. 261. But if the devisor be prevented by the fraud of the heir from making, or from completely executing, or from republishing his will, equity will convert the heir into a trustee for the devisee. See Sellack v. Harris, 5 Vin. Ab. 521. pl. 31. Vane v. Fletcher, 1. P. Wms. 352.

(1) Cheney's

cafe, 5 Co. 68. r Roll's Ab.

379. Christmas v.

Christmas, Sel.

SECTION XI.

A ND it has been faid, that where there is a written agreement, the whole fense of the parties is presumed to have been comprised therein (1), and it would be dangerous to make any addition (o) in cafes

Ca. Ch. 20. Lord Irnham v. Child, 1 Bro. Rep. 92.

> (e) Where an agreement in writing is executed, it were not only against the express provisions of the statute of frauds, but also against the policy of the common law, to allow of parol evidence, for the purpose of adding to, or varying the terms of the agreement, Partriche v. Pawlett, 2 Atk. 383. Tinney v. Tinney, 3 Atk. 8. Binsted v. Coleman, Bunb. 65. Meers v. Ansell, 3 Wilf. 275. Hare v. Sherwood, 3 Bro. R. Bridges v. Duchess of Chandos, 2 Vez. Jun. 417. : but if it be alledged, that some material part of the agreement was omitted by fraud, or that the intention of the parties was mistaken and misapprehended by the drawers of the deed, in fuch cases, it seems, evidence will be admissible, even though the agreement be executed. Langley v. Brown, 2 Atk. 203. Towers v. Moor, 2 Vern. 98. Hill v. Wiggett, 2 Vern. 547. Harvey v. Harvey, 2 Ch. Ca. 180. but Q. Whether there must not be some writing to proceed upon, Doran v. Ross, 3 Bro. Ch. Rep. 27. a fortiori-will fuch evidence be admissible, where the agreement is executory? Joynes v. Stratham, 3 Atk. 388. Baker v. Paine, 1 Vez. 456. It may be material to observe, where evidence dehors the deed is admitted

cases where there does not appear any fraud in leaving out any thing. Yet if, by proof, it appears that a settlement

was

mitted to shew what was the consideration of the agreement, that the confideration to be proved must be confishent with the confideration stated; as in Rex v. the Inhabitants of Scammonden, 3 Term Rep. 474. Fulbeck's Parallel, p. q: and if the deed specify the confideration to have been a fum of money, evidence is not admissible, in order to superadd another consideration, as natural love and affection, &c. Clarkfon v. Hanway, 2 P. Wms. 204. Peacock v. Monk, 1 Vez. 128. Nor, if the confideration fail, can evidence be admitted to support the conveyance as a gift, Bridgeman v. Green, 2 Vez. 627. Ramfden v. Jackson, 1 Atk. 294. Hawes v. Wyatt, 3 Bro. Rep. 156.; and though the deed specify a particular consideration, and "other confiderations," generally, no confideration but that expressed shall be intended, Lacey v. Whatston, Cro. Eliz. 343. but Q. whether other confiderations might not be proved? I do not propose, in this place, to confider the cases in which parol evidence is admissible to explain a will; it may therefore be fufficient to flate generally, that parol evidence is admissible for the purpose of explaining a latent ambiguity, either in a deed or will, Lord Bacon's Maxims, rule 23. Fonnereau v. Poyntz, I Bro. Rep. 472. Maybank v. Brooks, I Bro. Rep. 84.; and also for the purpose of rebutting an equity or trust raised by implication, Petit v. Smith, 1 P. Wms. 7. Lady Glanville v. Duches of Beaufort, I P. Wms. 114. Gainsborough v. Gainsborough, 2 Vern. 252. Lamplugh v. Lamplugh, 1 P. Wms. 113. Littlebury v. Buckly, cited 2 Vern.

was intended, and the articles agree with the intent of the parties, but the fettlement does not, it shall go according to the articles, although the fettlement was made before the marriage (2), when it may be supposed to have been waved, as it might be before marriage, though not after-

(2) Honor v. Honor, 2 Vern. 658. 1 P. Wms. 123. West v. Erriffey, 2 P. Wms. 349. 3 Bro. P. C. 3²7.

327. Roberts y. Kingsley. 1 Vez. 238.

g Vern. 677. Bachelor v. Searle, 2 Vern. 736. Duke of Rutland v. Duchels of Rutland, 2 P. Wins. 210. Mallabar v. Mallabar, Forrester, 78. Lake v. Lake, 1 Wils. 313. Ambler, 126. Brown v. Selwyn, Forrester, 240. But if evidence be adduced to rebut the equity or trust raised by implication, such evidence may be encountered by other evidence, to support such equity or trust, Rachfield v. Careless, 2 P. Wins. 159. Nourse v. Finch, 1 Vez. Jun. 344.

(p) The cases referred to in the margin, do not wholly bear out our author's propositions; for in all those cases, the settlement purports to have been made in pursuance and performance of the articles; which circumstance reconciles the decisions with the distinction taken by Lord C. Talbot, in Legg v. Goldwire, Forrester, 20. that "where articles are entered into before marriage, and the settlement be made after marriage, different from those articles, (as if by the articles the estate was to be in strict settlement, and by the settlement the husband is made tenant in tail, whereby he hath power to bar the issue,) this court will set up the articles of settlement. But when both articles and settlement are previous to the marriage, at a time when

afterwards (p). So where the husband, when he proposed the treaty of marriage, offered

when all parties are at liberty, the fettlement differing from the articles will be taken as a new agreement between them, and shall control the articles." The fame diffinction had been pointed out, and infifted on, in Burton v. Haftings, Gilbert's Rep. 113, 114. but it was not adopted, nor recognized by the court. Courts of equity will not only vary the terms of a fettlement in confideration of marriage, when made after marriage or before marriage, if expressed to be in pursuance of the articles; but will also modify the limitations of the articles, so as to answer and effectuate the real end and intention of the parties, notwithstanding the legal operation of the words in which the articles are expressed. For courts of equity do not confider themselves tied up to an implicit observance of the same rule with courts of law, in respect to those limitations, which are the immediate objects of their jurisdiction; namely, limitations which do not include or carry the legal estate. See Mr. Fearne's Effay on Contingent Remainders. p. 124. 4th ed. This most able writer having enumerated all the cases upon that subject, and pointed out the principles to which they are to be respectively referred, observes, that "upon the whole, the general doctrine upon this subject appears to be, that, in the case of articles before marriage, containing limitations that would give the parents, or either of them, fuch an estate tail as would enable the father alone, during the coverture, or the furviving parent afterwards, to bar the iffue of a marriage under a legal fettlement, limiting the estate in the same words, equity will rectify it, and make a strict fettlement, unless the issue is other-

offered to settle 500l. per ann. jointure, and after the marriage took notice, that the jointure fettled was not fo much, and talked of making it up fo much; although there was no covenant or agreement proved, whereby he bound himfelf to make

wife provided for than by the limitations to the heirs, &c. or from other limitation, or provision in other lands, it appears that the parties knew and intended the distinction. But the court will not interfere, if both articles and fettlement are made before marriage, unless the settlement in that case be expressed to be made in pursuance of the articles; for the court will suppose that the parties had altered their intention, with respect to the terms of their marriage; which they may do before the marriage, though not afterwards; and that the fettlement was made in pursuance of fuch new agreement, and not of the articles. But when it is faid to be made in pursuance of the articles, all room for fuch a supposition is precluded." Fearne's Con. Rem. 155, 156. However, it is material to observe, that, in those cases, courts of equity will not interpole to the prejudice of purchasers for valuable confideration and without notice, West v. Errissey, 2 P.Wms. 349. Powell v. Price, 2 P.Wms. 535. Warwick v. Warwick, 3 Atk. 291. Nor will they vary the fettlement, unless the articles themselves be produced, Cordwell v. Macrill, Amb. Rep. 515. though evidence be offered to shew what the instructions were, Asherton v. Rooke, 3Vin. Ab. 366. nor if the fettlement after marriage secure an equivalent. Glanville v. Payne, 2 Atk. 39.

a jointure

a jointure of that value, yet the heir shall be decreed to make it up (3). For a covenant is but an evidence of the agreement; and therefore, if there be any other evidence, which proves the agreement, it is as good (4).

(1) Benfon v. Bellafis, 1 Vern 17. Gleg v. Gien, 5Vin. Ab. 511. pl. 21.

(4) See c. 3.

f. 1. (2) Brice v. Carr, 1 Lev. 47. Norris's case, Hard. 178.

SECTION XII.

A ND fo much for the agreement of the party that conveys. But an affent on the part of the person that takes, is also effential to all conveyances and contracts; for where a man is to be vested with an interest, his acceptance is necessary (1); otherwise, of a bare au- (1) Thompson v. Leach, thority only (q). Yet this is not to be 2Ventr. 198.

Curtis and Cottel's case, 2 Leon. p. 72. pl. 97. 5Vin. Ab. 508. pl. 1. Alderson v. Temple, 4 Burr. 2235.

(q) See Thompson v. Leach, 2 Ventr. 198. in which this subject is very elaborately discussed by Ventris, J. See also Butler and Baker's case, 3 Co. 26. Hob. 171.

compared

compared with fuch collateral acts or cir-

cumstances, as, by the positive law, are made the effectual part of a conveyance, viz. livery of feifin, attornment (r), and fometimes entry of the party; as in case of exchanges (s), or the like. For where an act is done for a man's benefit, his agreement is implied till he difagrees; because no man can be supposed to be unwilling to do that which is for his advantage. And this does not hold only in conveyances, but in the gift of goods or chattels (2), whether in possession or action (t). But the donee may make refusal in pais; and hereby the property and interest shall be divested out of him: for a man cannot have an estate put into him in spite of his teeth. But when a

(2) Butler and Baker's cafe, 3 Co. 26. b. Harris v. De Bervois, Cro. Jac. 687. Wankford v, Wankford, 1 Salk. 301.

- (r) The necessity of attornment is in most cases taken away by the statutes 4 Anne, c. 16. f. g. and 11 G. 2. c. 19. f. 11.
- (s) Upon an exchange, or on partition, the parties have neither freehold in deed nor in law before they enter, Co. Litt. 266. b.
- (t) Q. Whether a gift is not countermandable by the donor before actual acceptance by the donee, fee Atkin v. Berwick, Stra. 165. 10 Mod. 432. Cent. p. 109. cafe 9.

freehold

freehold is vested in him, it cannot be divested by nude parol in pais (u); but remains in him always till disagreement in a court of record, to the intent that the tenant of the præcipe may be the better known (3); except in some special cases.

(3) Butler and Baker's cafe, 3 Co. 26. b. Popham, 89. 2 Leon. pl. 97.

(u) "As an act in pais will, in some cases, amount to an agreement, fo an act in pais, in fuch cases, may amount to a difagreement; as where the tenant by deed doth enfeoff the lord and a stranger, and makes livery to the stranger in the name of both; in this case, if the lord by word disagree to the estate, it is nothing worth; and on the other fide, if he enter into the land generally, and take the profits, this act will amount to an agreement to the feoffment; but if he enter into the land, and distrains for his figniory, this act amounts to a disagreement of the feoffment, and will divest the freehold out of him. And yet, in some cases, a claim by word will direct an entry to be an agreement to one estate, and a disagreement to another; as, if lands be given to husband and wife in tail, and after the statute of 32 H. 8. the husband aliens the land to the use of him and his heirs, and afterwards devises it to his wife for life, and dies, the wife enters, claiming by word the estate for life, this is a good disagreement to the estate of inheritance, and a good agreement to the estate for life; for there is not any doubt of the tenant to the præcipe, and the act and the words work together. But if the wife, before her entry, agrees by word to one estate, and difagrees to the other, this is nothing worth." 3 Co. 26. b.

CHAP.

CHAP. IV.

Of the Subject Matter of Covenants.

SECTION I.

It is a certain rule, that agreements receive all their force from the ability of the parties, and can never extend further (a); for of fo much, and no more, have they a liberty of disposing (1). If, therefore, they know on both sides that the thing is absolutely impossible, and are privy to each other's knowledge as to

(1) Heineccius, J. N. & G. c. 14. § 397.

(a) This rule only applies to fuch undertakings as are impossible to all men, and with the nature of which every man must be presumed to be acquainted; and it is observable, that though our author lays down the rule, that the ability of the parties determines the measure of the obligation, yet, in the illustration of the rule, he shews that damages may be recovered on an agreement impossible to be performed, if the party undertaking alone knew of the impossibility. And this is agreeable to the principles laid down by Pussendorss, from whom our author seems to have drawn his distinction. Pussendorss, b. 3. c. 7. s. 2.

this

this point, the engagement cannot be esteemed a deliberate and serious act, or be of any validity (1). But if the under- (1) Co. Litt. taker only knew the impossibility, and not the other party, he shall pay him the damage that he fustains by being thus imposed upon (2). And so, if he neglected to weigh his own strength, so as to undertake an impossibility, which, upon due confideration, he might have found to be fuch (b). And in the civil law, an impossible condition avoided the contract; for they concluded, that by the adding a condition, which they knew to be impossible, the parties could not intend the agreement should be of any force (3). (3) Inft. lib. 3. Yet, it feems, in the law of England, the Dig. lib. 45. Yet, it feems, in the law of England, the tit. 1. 7. rule is not the same of conditional as of Domat, b. 1. tit. 1. 1. 4. 13. other contracts. For by that law, an agreement to do a thing in itself impossible,

(2) Thornborow v. Whitacre, 2 Lord Raym.

(b) If A. for money paid him by B. will undertake to do an impossible thing, an action shall lie against him for not performing it; as in case of a bond with an impossible condition, the bond is fingle: fo where a man will, for a valuable confideration, undertake to do an impossible thing, though it cannot be performed, yet he shall answer damages, P. Holt, C. Justice, Thornborow v. Whitacre, 2 Lord Raymond, 1164, 5. but see Putterton v. Agnew, 1 Salk. 172.

or out of the power of man, is void in all cases (c). And they make this difference between

(c) Lord Coke, in confidering the effect of imposfible conditions, appears to have classed them under four distinct heads: " ist, Where they are possible at the time of their creation, but afterwards become impossible; and he distinguishes that impossibility which is produced by the act of God, and that which is produced by the act of the party. 2dly, When they are impossible at the time of their creation. 3dly, When they are against law, as mala prohibita, or mala in se. 4thly, When they are repugnant to the grant by which they are created, or to the estate to which they are annexed." See Co. Litt. 206. a. note (1), Hargrave and Butler's ed.) "In any of which cases," Sir William Blackstone observes, " If they be conditions subsequent, that is, to be performed after the estate is vested, the estate shall become absolute in the tenant: but if the condition be precedent, or to be performed before the estate vests, the grantee shall take nothing by the grant; for he hath no estate until the condition be performed." 2 Bla. Com. 156, 157. See Popham v. Bamfield, 1 Vern. 83. Lord Falkland v. Bertie, 2 Vern. 340. This distinction between conditions precedent and fubsequent is often mentioned in courts of equity; yet the prevailing distinction in equity, as to conditions, is where compensation can be made, and where not; and therefore, where A. conveyed lands to B. &c. upon trust, that if C. the fon of A. within fix months after the death of A. should secure to trustees 500l. for the younger children of C. then, after fuch fecurity given, to convey to C, and his heirs, and until the time

between an impossible and an uncertain limitation of an estate; that the first cannot be intended any part of the contract, nor to have been the subject of deliberation; for no man in his senses deliberates about what is absolutely out of his power; but an uncertain limitation is void (4) upon another account, viz. because the court cannot ascertain it. But as to impossible conditions, if they be precedent, the interest will never vest (5); but if subsequent, the deed is single; for it shall be intended, that he knew he could not perform it, and so did not design to defeat the deed.

(4) Shepherd's Touchstone, c. 23. p. 414. Anon. I Mod. 180.

(5) Feltham v. Cudworth, 2 Lord Raymond, 766. Co. Litt. 206. Pophamv. Bamfield, 1Vero. 83-1 Roll's Ab 419 5Vin. Ab. 110, 111.

2 Comyns's Dig. p. 325.

time for giving such security in trust for the eldest son of C. and in default of such security, to convey to such eldest son and his heirs, C. died before such security given: yet this condition precedent being only in the nature of a penalty, the intent of the trust shall be regarded, which was to secure 500l. to the younger children, Wallis v. Crimes, I Ch. Ca. 89. See Glass-cock v. Brownell, Finch, 178. Pitcairne v. Brace, Finch, 403. Woodman v. Blake, 2 Vern. 222. Bertie v. Falkland, 2 Vern. 339. But though equity will, under some circumstances, relieve against the breach of a condition precedent where damages are certain; yet, it seems, that they will not where the damages accrued are contingent, and cannot be estimated, Sweet v. Anderson, 5 Vin. Ab. 93. pl. 15. see c. 6. f. 4.

SECTION II.

Heineceius, J. N. & G. c. 14. f. 397.

(1) 1 Roll's Ab. 419. 5 Vin. Ab. 110.

(2) Cholmley's cafe, 2 Co. 51.

BUT a man may bind himself to do any thing, which is not in itself impossible (1); and it is at his peril if he does not perform it (d). And the legal distinction between a near and remote possibility (2) having no foundation in reason, is not regarded in equity (e); and therefore, since the statute of 21 H.8. cap. 15. when long leases could first be taken with security, a remainder of a term for years was admitted there, and deemed as strong an interest as an estate of free-

- where the cases illustrative of this rule are collected. See also Smith v. Morris, 2 Bro. Rep. 311.
- (e) There are two kinds of possibilities: the one a bare possibility, that which the heir has from the courtesy of his ancestor, and which is nothing more than a mere hope of succession; and a possibility coupled with an interest, such as an executory devise, or springing use. The first kind of possibility is not regarded at law, though, under particular circumstances, it is in equity: the latter is now, under certain restrictions, equally regarded both at law and in equity.

hold

hold and inheritance (f). So if A. covenants, &c. in case he dies without issue, to give his lands in D. to his brother, this shall be carried into execution, upon the falling of the contingency, although the limitation be after a dying without iffue (3). So although a grant (4) of a possibility is not good in law (g), yet a possibility of a Norfolk's case, truft

193.

(3) Goylmer v. Paddifton, 2 Vent. 353. See Duke of 3 Ch. Ca. 1. Fletcher's cafe, 1 Eq. Ca. Ab.

(4) Cheddington's cafe, 1 Co. 154. b. Fulwood's cafe, 4 Co. 66. b.

(f) It is certainly true that the remainder of a term, after a limitation for life, was formerly held to be void at law, because by possibility the life might not expire during the term, Dyer, 74. pl. 18. I Roll's Ab. 610. pl. 4.; but equity confidering this rule as against natural justice, and a serious impediment to farmers of long leafes, anxious to make provision for their families, allowed fuch limitations to operate by way of trust: the good effects of which induced courts of law to relax their former rule in favour of fuch limitations in a will, which are now allowed to operate at law by way of executory devises, Matthew Manning's case, 8 Co. 95. but, as executory devises were originally treated in equity as limitations of a trust, fuch limitations over, of a term in trust, are allowed to prevail in equity even in a deed, Walmstrey v. Tanfield, 1 Ch. Rep. 16. Duke of Norfolk's cafe, 3 Ch. Ca. 1. 1 Eq. Ab. 192. Maffenburgh v. Ash, 1 Vern. 234. 304.

(g) "The wisdom and policy of the sages and founders of our law," fays Lord Coke, "have provided that no poffibility, right, title, nor thing in action, shall. (5) Walmfrey trust in equity might be assigned (5). So v. Tansield, 1 Ch. 18. a covenant to settle lands, of which he Goring v.

Bickerstaffe, 1 Ch. Ca 8. Pollex. 31. Wind v. Jekyll, 1 P. Wms. 572. Vezey v. Pis. well, Pollexsen, 44. Higden v. Williamson, 3 P. Wms. 132. Kempland v. Courtenay, 2 Freem, 250. Theobald v. Dustay, 9 Mod. 101. Duke of Chandos v. Talbot, 2 P. Wms. 608.

shall be granted or affigned to strangers; for that would be the occasion of multiplying contentions and suits," &c. " But all right, title, and actions, may be released to the terretenant for the same reason, for avoiding contentions and fuits," Lampet's case, 10 Co. 48. a. And though a possibility, or contingent interest, be not grantable at law, yet, whether in real or personal estate, it is transmissible and devisable, Sheriff v. Wrotham, Cro. Jac. 509. Pinbury v. Elkins, 1 P. Wms. 566. King v. Withers, Forrester, 117. Gurnel v. Wood, 8 Vin. Ab. 112. pl. 38. Chauncey v. Graydon, 2 Atk. 616. Peck v. Parrott, 1 Vez. 236. Vezey v. Pinwell, Pollexfen, 44. Jones v. Roe, 3 Term Rep. 88. Selwyn v. Selwyn, 2 Burr. Rep. 1131. See also Barnes v. Allen, 1 Bro. Rep. 181. Fearne's Con. Rem. 444. The cases referred to in the margin abundantly prove, that interests in contingency, respecting personal estates, are assignable in equity; but it may be material to observe, that, in the case of affignments of fuch interests, equity requires the affignee to shew that he gave a valuable confideration for the interest affigned; and therefore will not interpose to affist vo-Junteers. But courts of equity will establish assignments of contingent interests against executors, administrators, or heirs at law, even where fuch affignments are made, not for confideration of money, but in confideration of love and affection, and advancement of children, Wright v. Wright, 1 Vcz. 400.

had only a possibility of descent (b), shall be carried into execution in equity (6); for the court does not bind the interest, but, instead of damages at law, ensorce the performance in specie. But the law does not admit of grants, or other conveyances, except there be a soundation of an interest in the grantor, and he has the thing either actually or potentially.

(6) Hobson v.
Trevor,
2 P. Wms. 191.
Beckley v.
Newland,
2 P. Wms. 182.

(b) A distinction appears to have been taken in Wright v. Wright, 1 Vez. 409. between assignments of a possibility of an inheritance, and assignments of a possibility of a chattel real: the distinction was, however, over-ruled; and the cases of Beckley v. Newland, and Hobson v. Trevor, were referred to by Lord Hardwicke as conclusive upon the point. It is obfervable that Lord Kenyon, C. J. in the case of Jones v. Roe, 3 Term Rep. 88. put the case of an heir dealing in respect of his hope of succession as a void contract; it being a bare possibility, and not the subject of a disposition during the life of the ancestor: from which it may be inferred, that damages could not be recovered at law for non-performance of such a contract; and yet it appears, from the above cases of Buckley v. Newland, and Hobson v. Trevor, that such a contract would be decreed in equity, if for a valuable confideration. This, therefore, may be confidered as an instance, in which a court of equity will decree the specific performance of a contract, though damages could not be recovered at law for the non-performance of it.

Yet of declarations precedent it does allow, provided it be afterwards enforced by some new act: as, if a man covenants to purchase the manor of D. and to levy a fine of it before fuch a day, to certain uses expressed in the indenture of covenants, this deed to lead the uses will be fufficient, though the land is purchased after; because there is a new act to be done, viz. the fine (i). But if I covenant with my fon, in confideration of natural love, to fland feifed to his use of the lands which I shall after purchase, yet the use is void: the reason is, because there is no new act to perfect this beginning (k), and I had nothing at the time of the covenant (7). So if I mortgage land.

(7) Yelverton v. Yelverton, Cio. Eliz. 401. 2 Roll's Ab. 790.

- (i) The case admitted in Yelverton v. Yelverton, Cro. Eliz. 401. Supposes no other uses to have been limited at the time of levying the fine; which may be a material circumstance, where there appear to be two deeds limiting distinct and inconsistent uses, see Jones v. Morley, Holt's Rep. 321.
- (k) Though a covenant to fland feifed of lands to be after purchased be void at law and in equity, unless there be some new act to be done; because a covenant to stand feised presupposes seisin, Gilb. Uses, 116, 117. yet it feems, that a covenant to fettle lands of fuch a

value

land, and after covenant with I.S. in confideration of money, that after entry for the condition broken, I will stand feifed to the use of the said I. S. and I enter, and this deed is enrolled, and all within the fix months, yet nothing passes (1), because this enrolment is no new act (m), but only a perfective ceremony of the first deed of bargain and fale (8). And the law is the fironger (8) Referred to in this case; because of the vehement relation which the enrolment has to the

in Yelverton v. Yelverton, Cro. Eliz. as having been decided in 20 Eliz. but neither the

time name of the case nor of the court is mentioned.

value will charge after-purchased lands, though the covenantor had none at the time of executing the covenant, Took v. Hafting, 2 Vern. 97.

- (1) Conveyances by bargain and fale are, in this particular, less operative than a feoffment or fine; for by a feoffment or fine, all uses and possibilities are conveyed: but it is otherwise by bargain and fale, Anon. 1 Leo. 33. Edwards v. Slater, Hardres, 416.
- (m) This mode of conveying land is created and established by the 27 H. 8. c. 10. which executes all uses raised; and as this introduced a more secret way of conveyancing than was known to the policy of the common law, the enrolment of the deed of bargain and fale was made necessary by the 27 H. 8. c. 16. and as, till enrolment, the conveyance is inchoate and imperfect, the lands remain in the bargainor; but

(9) 32 H. 8. c. 1. 34, 35 H. 8. c. 5. 12 Car. 2. c. 24. (10) Brett v. Rigden, time of the bargain and sale, at which time I had nothing but a bare condition. So the statutes of wills (9) of land require, that the devisor should be seised (n) of the land at the time of making his will (10).

But

Piowd. 343. Bunter v. Cook, 1 Salk. 237. Holt's Rep. 249. 1 Bro. P. C. 199. Strode v. Falkland, 3 Ch. Rep. 100. 3 Com. Dig. 18.

when the conveyance is completed by the enrolment, relation shall be had to the delivery of the deed, and the bargainee shall be considered as seised of the land from such period, Sheppard's Touchstone, Bargain and Sale.

(n) But though after-purchased freehold lands will not pass by a will without republication, (that a codicil, duly executed, is a republication, fee Barnes v. Crow, 4 Bro. Rep. 10.) the flatute requiring the devisor to be feiled at the time of making his will; yet, if the devilor, at the time of making his will, has contrasted for land, fo that he has an equitable estate in such lands, they will pass by general and sweeping words, Davie v. Beardsham, 1 Ch. Ca. 39. Prideaux v. Gibbon, 2 Ch. Ca. 144. Allen v. Allen, Moseley, 262. Milner v. Mills, Moseley, 123. Potter v. Potter, 1 Vez. 437. Gibson v. Lord Montfort, 1 Vez. 494. Foley v. Percival, 4 Bro. Rep. 420. and the circumstance of a day fubsequent to the date of the will being agreed on for the execution of fuch contract, will not vary the case, Greenhill v. Greenhill, Pre. Ch. 320. but the articles must have been entered into before the making of the will, Langford v. Pitt, 2 P. Wms. 629. and they must be fuch as a court of equity would have enforced in specie, Potter v. Potter, I Vez. 437. And though the specific

But a man may devise things personal (0) which he has not; for the legacy passes not by the will, but by the assent of the executor, to whom the will is only directory(11). And whatever thing would come to my executors, I may dispose of by my will, as a right of a term, or a thing in action when recovered; for the executor has his authority only to sulfil the will (12). But at common law, what should not be done by my executors, but by my heir, could not be devised as a possibility, &c. unless vested with an interest

(11) Bunter v. Cook, Salk. 237. Sayer v. Sayer, 2 Vern. 688. Mafters v. Mafters, 1 P. Wms.

(12) Vezey v.
Pinwell,
Pollerf. 44.
Kempland v.
Courtenay,
2 Freem. 250.
Theobald v.
Daffey, 9 Mod.
101.
2 P. Wms. 608.

specific lands cannot afterwards be had, the money will be bound by the contract, Whitaker v. Whitaker, 4 Bro. C. R. 31. but see Green v. Smith, 1 Atk. 572. See also Pulteney v. Lord Darlington, 1 Bro. Rep. 226, 227. where the cases upon this head are distinguished and classed.

(0) In Bunter v. Cook, the court of King's Bench doubted whether a chattel real, acquired after the making of the will, would pass by it; but that doubt seems to have been since done away; for in Wind v. Jekyll, 1 P. Wms. 575. Lord C. Parker held, that such an interest would clearly pass, and stated the reason of the difference between freehold and personal interests, acquired subsequent to the making of the will, to be, "that with regard to the real estate bought after the marriage, supposing that not to pass, still there is one

terest (p): yet, it seems, since the statute of uses, the devisee may take benefit of it by an equitable construction.

in law capable of taking it, viz. the heir; but as to the personal estate, if the executor, though appointed before the acquiring thereof, does not take it, it is uncertain who shall."

(p) Such an interest was held, in Marks v. Marks, Pre. Ch. 486. to be descendible; but it may be proper to observe, that it vests not in the person who is heir at law at the time of the death of the first purchaser of fuch possibility, but in fuch person as may be his heir at law at the time of the contingency happening, Goodright v. Searle, 2 Wilson, 29. Fearne, Exec. Dev. 448. 3d ed. And it feems now to be finally fettled, that a possibility clothed with an interest is not only descendible, but devisable, Selwyn v. Selwyn, 2 Burrows's Rep. 1131. Jones v. Perry, 3 Term Rep. 88.

SECTION III.

AND even at law, a man is bound to do all that lies in his power (1); fo that if part of the agreement becomes impossible by the act of God, that does not discharge

(1) Litt. Sec. Thornborow v. Whitacre, 2 Lord Rava mond, 1165.

discharge the rest (q), although it were in the disjunctive, and he is deprived of his election. So if the whole were at first impossible, yet if it may become possible, before

(q) The case here referred to is probably an anonymous case, 1 Salk. 170. where the condition was to make the obligee a leafe for life by fuch a day, or pay him 1001.—Obligee died before the day, and adjudged that his executors should have the 100l. per Treby, C. J. And the ground of Laughter's case, 5 Rep. 21. was denied to be universal. The reason of the judgment in Laughter's case is reported by Lord Coke to have been, that "where a condition of a bond confifts of two parts in the disjunctive, and both are possible at the time of the bond made, and afterwards one of them becomes impossible by the act of God, the obligor is not bound to perform the other part; for the condition is made for the benefit of the obligor, and shall be taken beneficially for him, and he hath election to perform the one or the other for the faving of the penalty of his bond; and when one part is become impossible by the act of God, it is as beneficial for. him, as if that part of the disjunctive which is become impossible, had been the only condition of the bond. And so when one became impossible by the act of God, which by no industry he could perform, his bond is faved, although he doth not perform the other, quia impotentia excufat legem." Graydon v. Hicks, 2 Atk. 18. In Studholme v. Mandell, i Lord Raym. Rep. 270. the court are reported to have faid, that " the rule and reason in Laughter's case ought not to be taken so largely as Coke has reported, but according to the nature of the case." The rule, however, was allowed

(2) Dr. Bettefworth v. Dean and Chapter of St. Paul's, Sel. Ca. Ch. 66. 3 Bro. P. C. 389. Grounds and Rudiments of Law and Equity, pl. 254. Parry v. Brown, 3 Ch. Rep. 6. 1 Ch. Ca. 23.

before he is compellable to do it, it is not void; for the law respecteth the right of possibility, and will have nothing to be void that by possibility may be made good. As where a dean and chapter (2), before the disabling act, made a lease for ninetynine years, and covenanted to renew, at the expiration of the ninety-nine years, for ninety-nine years more; although the covenant is entire, yet they ought to make fuch leafe as is in their power, viz. for forty years, which was allowed them by the statute (r).

to be good law, and has been followed in many fubfequent cases, Wood v. Bates, Sir William Jones's Rep. 171. But if the condition confift of two parts, of which one was not possible at the making of the condition, the other ought to be performed, 21 Ed. 3. 29. b. Mallory's case, 5 Rep. 112. a. f. 5. See 5 Vin. Ab. Condition (G. c).

(r) From the rule laid down in Brewster v. Kitchell. 1 Salk. 198. that where a man covenants to do a thing which is lawful, and an act of parliament comes and hinders him from doing it, the covenant is repealed; it might be inferred, that the Dean and Chapter of St. Paul's were relieved from their covenant to renew, the statute having restrained them from granting leafes for fo long a term as was agreed for: but this reasoning is by no means agreeable either to the rules of law, or principles of equity; for lex nemini facit

facit injuriam, is an established rule of law; but the statute would be made to work a wrong contrary to its spirit or provision, if it wholly annulled an agreement which might take effect in part, without prejudice to the object of the legislature; still less could fuch an inference be reconciled with the principles of equity, which treat the performance of contracts as the discharge of a moral duty as well as of a legal obligation; and therefore, where A. having power to leafe for 10 years, leafeth for 20 years, the lease for 20 years shall be good for 10 years, Pawsey v. Bowen, 1 Ch. Ca. 23. Campbell v. Leach, Amb. 740. But equity will not decree an underlease on an agreement to affign, though it appear that the affignment cannot be made without a forfeiture; for the defendant, in agreeing to affign, might intend to discharge himself from covenants to which he would continue liable by the underlease, Anon. E. T. 1790. MSS.

SECTION IV.

AND it is indispensably necessary, that we have both a natural and moral power (s) of performing what we undertake.

Pothier Traite des-Obligations partle 2. c. 3. art. 1. f. 2. 204,

(s) "Pacta qua contra leges constitutionesque vel contra bonos mores nullam vim habere indubitati juris est," Cod. lib. 2 tit. 3, l. 6. This rule of the civil law

(1) Puff. b. 3. c. 7. f. 6. Hemercius, I. N. & G. c. 14. f. 398.

take (1). For it would be abfurd, that an obligation, which derives its power from the law, should put us under a necessity of doing fomewhat which the law prohi-

is evidently drawn from the principles of universal justice; which, aiming at the prevention of wrong, prohibit agreements which would lead to or encourage wrong: but agreements to do any particular act, which is either malum in fe, or malum prohibitum, are not the only agreements which the law avoids; for as the divine and positive law prohibit the doing of certain acts, fo do they also enjoin the discharge of certain duties. Agreements, therefore, not to difcharge fuch duties, are equally against the interests of fociety, and confequently are equally void; as are also agreements which encourage such crimes and omissions. "Instances, therefore, of conditions against law, in a proper fense, are reducible under one of these heads: 1st, Either to do something that is malum in fe, or malum prohibitum. 2dly, To omit the doing fomething which is a duty. 3dly, To encourage fuch crimes and omissions, 1 P.Wms. 189." Upon the first head, this distinction is observable, that "though if a man be bound upon condition that he shall kill J. S. the bond be void; yet, if a man make a feoffment, upon condition that the feoffee shall kill I.S. the estate is absolute, and the condition void," Co. Litt. 206. b. So if a particular covenant in a bond be void, as against the common law; yet the bond is good for the covenants which are agreeable to law; for there is a difference between a bond made void by statute, and by common law: for a bond against the flatute

bits (t). Equity, therefore, will not decree tenant for life to commit a forfeiture (2). And so if 1000l. be bequeathed, to procure a dukedom to the head of the family, a bill will not lie for this (3); because it is illegal to acquire honour for money (u).

(2) Brian v. Acton, 5 Vin. Ab. 533. pl. 33.

(3) Earl of Kingston v. Pierrepoint, 1 Vern. 5.

flatute is wholly void; but the common law doth divide according to common reason, and having made that void that is against law, lets the rest stand, Norton v. Simms, Hob. 14. 2 Wils. 351.

- (t) Or of not doing fomething which the law en-
- (u) And as the public are materially interested in the dispensation of honours, so are they in the grants of offices; and therefore the 5 and 6 Edw. 6. c. 16. prohibits the fale of the feveral public offices therein referred to, and declares all bargains and affurances respecting them to be null and void. But the provisions of this statute, not extending to all cases within the mischief which it was intended to prevent, have rendered it necessary for courts of equity, in many cases, to interpose; for though it be true, that "penal laws are not to be extended as to penalties and punishments, yet, if there be a public mischief, and a court of equity fees private contracts made to elude laws enacted for the public good, it ought to interpofe," P. Lord Talbot, Law v. Law, Forrest. 140. and that upon the public policy of the law, though the office be not within the statute of Edw. 6. (Harrington v. Du Chatel, I Brown's Rep. 124.) which, it is observ-VOL. I. able,

(4) Weller v. Gafcoigne, 13 Vin. Ab. 544. pl. 13. So a bill for an allowance for attendance at auctions (x) to enhance the price of goods, shall be dismissed with costs (4); for

able, only affects contracts between the grantor and the grantee of the office, Bellamy v. Burrow, Forrest. 108. and not persons acting as office-brokers; and therefore, to avoid fuch contracts, it becomes necessary for obligors to come into equity, where it is a rule, "that if a man fells his interest, to procure a person an office of trust or service under the government, that it is a contract of turpitude. It is acting against the constitution, by which the government ought to be ferved by fit and able persons, recommended by the proper officers of the crown for their abilities, and with purity," per Lord Henley, C. Morris v. M'Cullock. Ambler's Rep. 435. But equity will not interpose if the obligation can be tried at law, Thrale v. Ross. 3 Bro. Ch. R. 57. and where it may be necessary for obligors, in a bond given for the illegal procuring of an office, to come into equity to fet fuch fecurity aside; yet, if an action for money had and received be brought upon the foot of an agreement, to allow the plaintiff a certain proportion of the profits of the office, in confideration of his having procured the defendant to be appointed to it, the plaintiff cannot recover; and that upon principles of public policy.-Parsons v. Thompson, 1 Bla. T. Rep. 322. Garforth v. Hearon, 1 Bla. T. Rep. 327. which cases seem to have very much shaken, if not over-ruled, the case of Bellamy v. Burrow, Forrester, 97. See also Lady M. Fordyce 2. Willis, MSS. 8th Feb. 1791. As to affignments of officers half-pay, see Stone v. Lidderdale, 2 Anstr. 533. and cases there cited of seamen's wages, I G. 2. st. 2. c. 14. Of an annuity for the support of a dignity, Oliver v. Enfonne, Dyer, 1, 2.

(x) The

for equity will never give countenance to demands of an unfair nature. But although, where the party himself comes to be relieved against a turp is contractus, as a bond to a common harlot, the court may perhaps resulte to interpose; for this court should not be a court to examine such matters: yet where the plaintiff is only an executor (5), that varies the matter (y).

(5) Matthew v. Hanbury, 2 Vern. 187.

- (x) The practice of puffing, as it is called, at auctions, was, in Bexwell v. Christie, Cowp. 395. confidered as illegal; but the legislature having fince that case enacted, that property put up to sale at auction shall, upon the knocking down of the hammer, subject the auctioneer to the payment of certain duties, unless such property can, by the mode prescribed by the act, be shewn to have been bought in by the owner himself, or by some person by him authorised, seems indirectly to have given a fanction to this practice, which may materially affect the authority of the decision in Walker v. Gascoigne, and the opinion in Bexwell v. Christie. See Morrice v. Twining, 2 Bro. Ch. R. 326. 28 G. 3. c. 37. s. 20. Attorney General v. Christie, MSS. 4th July 1791.
- (y) It is a rule both of law and equity, that ex turpi contractu actio non oritur; but it is material, in the application of this rule, to confider what is to be deemed turpis contractus, and the evidence which is admissible to shew it. As to the evidence admissible to avoid the demand, on account of the turpitude of the contract, it is clear, that unless the turpitude of the Q 2

It is true, the common law will not inquire into the confideration of a bond; for

contract (except in the cases hereafter mentioned) appear upon the bond or obligation, it cannot be averred; though in an action of affumpfit upon a bill of exchange by the payee, the turpitude of the confideration may be averred.—As to what amounts to fuch a degree of turpitude as will vitiate the contract, it feems, that confiderations against the policy of the common law, or against the provisions of a statute, or against the policy of justice, or the rules and claims of decency, or the dictates of morality, are void in law and equity. But courts of law and equity distinguish between obligations for confiderations past and confiderations future; and therefore a bond, purporting to be in confideration of cohabitation had (by which must be underflood past and discontinued, Gray v. Matthias, H. T. 1799, Exch.) between the obligor and obligee, was held to be good, Turner v. Vaughan, 2 Wilf. 339. Hill v. Spencer, Ambler's Rep. 641. though, as merely voluntary, equity will postpone it to other debts, 'Cray v. Rooke, Forrest. 153. but a bond, in consideration of the parties having agreed to live together, was held void, Walker v. Perkins, 3 Burr. Rep. 1568. Where a court of equity is required to interpose, it is not only influenced by the above distinction of the consideration being past or future, but also by the characters and situations of the parties to the contract; therefore, if a man give a bond to a common strumpet, and the bill charges fuch to have been the fituation of the defendant, equity will relieve against it, Whaley v. Norton, 1 Vern. 483. But if the bond be given as premium pudicitiæ, equity will not fet it afide; "for if a man misleads an innocent woman,

for matter in pais may be avoided by averment, but not a deed (z). (And there are only

woman, it is both reason and justice he should make her a reparation," Marchioness of Annandale v. Harris. 2 P. Wms. 432. Cray v. Rooke, Forrest. 153. even this confideration must give way to higher claims: therefore, if the obligor was a married man, and the obligee knew him to be fuch, or if the obligee be a married woman, Robinson v. Gee. 1 Vez. 254. equity will not support the claim, Priest v. Parrott, 2 Vez. 160. Lady Cox's cafe, 3 P. Wms. 339. But in this cafe, it feems, that equity will not relieve the obligor, Spicer v. Hayward, Pre. Ch. 114. As courts of law will not allow actions to be maintained on fuch contracts, if the confideration appear, it may be proper to confider, whether an action could be fustained to recover back money paid upon them? The general rule of our law is, that where one knowingly pays money upon an illegal confideration, he is particeps criminis; and there is no reason that he should have his money again, for he. parted with it freely, and volenti non fit injuria, Buller's Ni. Pri. 181. 4th ed. In Neville v. Wilkinson, 1 Bro. Ch. Rep. 547. Lord Thurlow, C. having obferved, upon the cases in which it had been determined, that, upon a criminal act, a person who was particeps criminis, could not be relieved in a court of justice, flated the principle of those cases to have been departed from in many other cases; as in Anstey v. Reynolds, Stra. 015. Wilkinson v. Kitchen, Lord Raym. 89. and Moles v. Macfarlane, 2 Burr. 1005. The civil law appears to have made feveral reffrictions upon this point: " ubi et dantis et accipientis turpitudo verfatur non posse repeti dicimus, veluti si pecunia detur ut male

only two ways of pleading to a bond, viz. to the lien, as durefs, &c. to fhew that it never did operate; or to the condition, to fhew that it is defeated by matter of as high a nature:) but Chancery will, and fet it aside if illegal (a).

male judicetur. Idem si ob stupyum datum sit vel si quis in adulterio deprehensus redemerit le, cessat enim repetitio si non causa metus. Item si dederit sur ne proderetur, quoniam utriufque turpitudo verfatur ceffat repetitio. Quotiens autem folius accipientis turpitudo versatur, Celsus ait repeti posse; veluti si tibi dedero ne mihi injuriam facias. Sed quod meretrici datur repeti non potest. Sed novâ ratione non eâ, quod utriusque turpitudo versatur sed solius dantis: illam enim turpiter facere, quod fit meretrix, non turpiter accipere, cum fit meretrix. Si tibi indicium dedero ut fugitivum meum indices vel furem rerum mearum non poterit repeti quod datum est: nec enim turpiter accepisti. - Quod si à fugitivo meo acceperis, ne eum indicares condicere tibi hoc quasi furi possim; sed si ipse Fur indicium à me accepit vel furis vel fugitivi focius puto condictionem locum habere." Dig. lib. 12. tit. 5. l. 3, 4.

- (z) It feems to be now fettled, that if a bond be void ab initio, the facts which make it so may be averred, and specially pleaded, Collins v. Blantern, 2 Wilson's Rep. 347.
- (a) The interpolition of courts of equity is governed by an anxious attention to the claims of equal justice; and therefore it may be laid down as an universal rule, that they will not interfere, unless the plaintiff consent to do that which the justice of the case requires to be done,

SECTION V.

SO the law will not embolden the doing an illegal act; and therefore a condition against law makes all void. But this is to be understood of the doing some act that is malum in se, then it makes the bond void; otherwise not, unless it be against a statute; for a statute is a strict law, and the letter is so (1). And where a condition, by being against law, shall avoida bond, the condition must be against law expressly, et in terminis terminantibus. and not for matter out of the condition (2). as in bonds of refignation, and the like, without an averment. Yet if the bond is general for a refignation (b), fome special reafon

(1) Norton v.
Simm,
Hob. 14.
Maleverer v.
Red(haw,
1 Mod. 35, 36.
Collins v.
Biantern,
2 Wilf. 351.
(2) Brook v.
King.
1 Leon. 73.

(b) In the case of Fytche v. Bishop of London, it was determined by the court of Common Pleas, that general bonds of resignation were legal; which judgment, upon a writ of error, was affirmed in the King's Bench: but upon a writ of error being brought in parliament, after a long, elaborate, and able discussion, the judgment was reversed. See Cunningham's Law of Simony, where the proceedings in the house of lords are very fully reported. It seems difficult to reconcile

this

(3) Durston v. Sandys, 1 Vern. 411. Hawkins v. Turner, Pre. Ch. 513. Finch's Ed. and cases their referred to. Peele v. Capel, 1 Str. 534. Hillyard v. Stapleton, 1 Eq. Ab. 86. pl. 3.

fon must be shewn to require a resignation, or the Chancery will not suffer it to be put in suit (3): if it should not be so, simony (c) will be committed without proof or punishment. But, regularly, wherever there may be a way to perform the condition, without a breach of the law, it is good (4). As a condition to alien in mortmain; because there may be a licence (5).

Cunningham's Law of Simony. (4) Mitchell v. Reynolds, 1 P. Wms. 190. (5) 2 Bla, Com. 269.

this decision with the cases in which the patron, making an ill use of the bond, has been relied on as the only ground upon which the obligor could be relieved against it, Durston v. Sandys, 1 Vern. 411. Peele v. Capel, 1 Stra. 534. Grey v. Hesketh, Amb. 268. 3 Burn's Ec. L. 336. See also Babington v. Wood, Hutt. 111. Nor is the principle of the decision generally savored, or likely to be extended; for in Partridge v. Whiston, 4 Term Rep. 359. which was an action on a bond, to reside or to resign to the patron's son, &c. the court of B. R. observed, that as the case before them "was not precisely similar to the Bishop of London v. Fytche, they were bound by the established series of precedents to give judgment for the plaintiff."

(c) As to what constitutes simony, see Baker v. Rogers, Cro. Eliz. 788. Winchcomb v. Bishop of Winchester, Hob. 165. Barrett v. Glubb, 2 Bla. Rep. 1052.

SECTION VI.

AND this court will not meddle with play debts, or any fuch things (1). (1) Taylor v. Bell. However, this is not to be understood fo 2 Vein. 173. generally as it is spoken, but to mean, that the court will give no countenance to exorbitant gaming (c); because such improvident

(c) At common law, the playing at cards, dice, &c. when practifed innocently, and as a recreation, was not unlawful, 2 Vent. 175. nor is fo held now when not within the restriction of the act. Bulling v. Frost. Espinasse's Points at Nisi Prius, 235. But as the practice was found to encourage idleness and debauchery, the statute 33 H. 8. c. q. restrained it among the inferior fort of people. Gentlemen were, however, still left free to purfue it, until the 16 Car. 2. c. 7. by which (the preamble having flated the inconveniences to be remedied by the immoderate unlawful use of gaming) it is enacted, that if any person, by playing or betting, shall lose more than 100l. at one time, he shall not be compellable to pay his lofs, and the winner shall forfeit treble the value; one moiety to the king, the other to the informer. This provision of the legiflature was, however, foon found to be infufficient to its purpose: it was therefore enacted, by the 9 Anne, c. 14. for the more effectually suppressing of this pernicious vice, that all bonds, and other fecurities, given for money won at play, or money lent at the time to play with, should be utterly void; that all mortgages

vident hazards bring on the ruin of families. But the court has feldom denied to extend

or incumbrances of lands, made upon the same confideration, should be and enure to the uie of the mortgagor; and that if any person at one time lose 101: at play, he may, within three months, fue the winner, and recover it back, by action of debt at law: and in case the loser does not, within the time limited, fue and profecute, any other person may sue the winner for treble the fum fo loft; and the winner is obliged and compellable to answer upon oath the bill or bills filed against him for discovering the sum or fums of money, or other thing, fo won by him at play, Subsequent statutes have superadded further penalties to restrain this fashionable vice; "which," Sir William Blackstone observes, "may shew that our laws against gaming are not so deficient as ourselves and our magistrates in putting these laws in execution," These provisions of the legislature 4 Com. 173. have rendered it now less frequently necessary to refort to courts of equity, which appear to have often interposed, prior to the 16 Car. 2. for the purpose of restraining the winner from proceeding at law against the lofer, upon the fecurity which he had obtained for the money won. See Cromer v. Champney, 14 Vin. Ab. 8. pl. 1. Sucklyer v. Morley, 14 Vin. Ab. 8. pl. 3. Blackwel v. Redman, Ch. Rep. 47. It is obfervable, that the statute 16 Car. 2. declares, that the contract for money loft at play, and all fecurities given for it, shall be utterly void; but the statute o Anne confines itself to the fecurities for money won or lent at play. Upon which it has been determined, that though both the fecurity and the contract are void as

extend its relief against the gamester himfelf, in behalf of the person injured; as where two men play on a joint stock, and one holds the stakes, and sweeps up the money, he shall answer a moiety of that to his companion (2). And although equity will not usually interpose in cases relating to the gaming acts, because it considers both winner and loser equally guilty, and, in taking upon them to game, they seem

(2) See Watts v. Brooks, 3 Vez.

to money won at play, only the security is void as to money lent at play; and that the contract remains, and the lender may maintain his action for it, Robinfon v. Bland, 2 Burrows's Rep. 1077. Barjeau v. Walmfley, 2 Str. 1249. See also Huffey v. Jacob, 1 Com. Rep. 4. and the cases referred to by the editor Mr. Rose. It is scarcely necessary to observe, the acts having declared the fecurity void, that even a bill of exchange, given for money won at play, cannot be recovered upon by an indorfee for valuable confideration, and without notice, the original vice of the confideration affecting the fecurity even in the hands of an innocent and bona fide holder, Bowyer v. Bampton, 2 Str. 1155. Peacocke v. Rhodes, Doug. 614. Lowe v. Waller, Doug. 716. And it feems, that if money be paid on fuch fecurity, it may be recovered back; for payment under a void fecurity cannot be supported: nor does the limitation of three months, within which time the lofer of money actually paid at the time it is loft must bring his action to recover it back, extend to payments on account of fuch void fecurities, Rawden v. Shadwell, Ambler, 269.

(2) Firebrass
v. Brett,
2 Vern. 70.
refers to this
case by thename
of Sir Cecil Bishop v. Sir Tho.
Staples, before
Lord C J. Hale.

to renounce the benefit of the law; yet, even at law, in an action upon a wager, they have given the defendant leave to imparl from time to time (2); though, in strictness, it is not prohibited by the common law (d). Much more ought equity to discourage it; because the public is concerned that men should not misspend their estates and time. And in the civil law, they allowed the loser to recover his money again, even beyond the ordinary time of prescription (e).

- (d) In general, a wager may be considered as legal, if it be not an incitement to a breach of the peace, or to immorality; or if it do not affect the feelings or interest of a third person, or expose him to ridicule; or if it be not against sound policy, Da Costa v. Jones, Cowp. 729. Athersord v. Beard, 2 Term Rep. 610. Good v. Elliott, 3 Term Rep. 697. where the principal cases upon this point are very fully considered.
- (e) "Victum in aleæ lusu non posse conveniri et si solverit habere repetitionem tam ipsum quam hæredes ejus adversus victorem et ejus hæredes idque perpetuo et etiam post triginta annos, Cod. lib. 3, tit. 43. But the civil law allowed of certain games which tended to increase strength and agility, and to promote health; and at such games, the code declares, "Liceat quidem ditioribus ad singulas commissiones seu ad singulos congressus aut vices unum assem seu numisma seu solidum deponere et ludere, ceteris autem longe minori pecunia," Cod. 1. 3. ti. 43.

SECTION VII.

A S to the lawfulness of usury (1), since damages may be demanded for tardy payment, why may we not bargain for fomething certain beforehand, upon confideration that our money is in another man's power, when we were not obliged for his benefit to venture the loss, or to neglect the gain that might be made of it? And therefore, in the Roman law (2), long before Justinian's time, money might be lent at 12l. per cent. which was called usura centesima, but not higher, except it was lent at great hazards; for the laws there prescribed no bounds, any more than in certain conditional agreements. But, in England, anciently (f), the perfons of

(1) See Grotius de Jure Belli et Pacis, lib. 2. c. 12. f. 20. and Mr. Bentham's Vindication of Ufury. Heineccius, J. N. & G. c. 13. f. 367.

(2) Dig. lib. 22. tit. 1. paffim. Cod. 1. 4. t. 32. 26. 1 Domat. b. 1. tit. 6.

(f) It must not be understood from this expression, "anciently," that an usurer could at common law be proceeded against criminally; for it appears from Glanville, that it was only in case a man died an usurer, that even his effects could be confiscated, Glanville, lib. 7. 16. I Reeves's Hist. Eng. Law, 119. And it is stated, in 2 Roll's Ab. 801. that the statute of Edw. 3. by which the usurer was subjected to the censure of the ordinary, &c. was repealed in the same year.

ufurers

(3) 15Ed. 3. c. 6 (4) 2 Roll's Ab. 201 35 refers to 26 Ed. 3. 71. usurers were punished, and the ordinary had cognizance of them in their lifetime, to compel them to make restitution; and all their goods and lands escheated at their death to the king (3). And so odious was usury, in the eye of the common law (4), that a man could not maintain an action upon an usurious contract. But now such usury (g) as is allowed by the statute, hath obtained

(g) The term usury is not here used according to its present acceptation, viz. the taking more than legal interest for the use of money; but according to the opinion which anciently prevailed, that taking any interest was against the law of God, and the welfare of the community: and, in this fense, it feems difficult to reconcile the case in Roll with the statute 20 H. 3. c. 5. by which it is provided, that " from henceforth usuries shall not run against any being within age, from the time of the death of his ancestor, (whose heir he is,) unto his lawful age; so neverthelefs, that the payment of the principal debt, with the usury that was before the death of his ancestor, whose heir he is, shall not remain." The latter provision of the act is not very distinctly worded; but Lord Coke feems to have inferred from it, that the principal and interest incurred in the lifetime of the ancestor is enacted to be paid, 2 Inst. 89. And yet, in his 3d Inft. 152. he states, that by the ancient laws, ufury was unlawful and punishable; from which it would follow, that, in his opinion, this act gave a right of action, which the party had not before: but from the language

obtained such strength by usage, that it will be a great impediment to traffick, &c.

language of the 20 H. 3. c. 5. it feems clear, that an action could be maintained before, and that even against the heir; otherwise the exemption of the heir had been superfluous. But whatever were the prejudices of early times against the taking of interest, they appear to have worn off in the reign of H. 8.; a rational commerce having taught the nation, that an estate in money, as well as an estate in land, houses, and the like, might be let out to hire, without the breach of one moral or religious duty. And, indeed, when the fource of this prejudice is examined, it will be found to have originated in a political, and not a moral precept; for though the Jews were prohibited from taking usury, that is, interest, from their brethren, they were in express words permitted to take it from a stranger, Deut. 23. v. 20. This remark has, however, been powerfully attacked by the learned Pothier, who infifts that the taking of interest is against a moral duty, and that Moses made the above distinction merely ad Duritiam Cordis of the Jews. Tom. 2. p. 734. 4to. ed. " A capital distinction must, however, be made between a moderate and exorbitant profit; to the former of which we usually give the name of interest; to the latter, the truly odious appellation of usury: the former is necessary in every civil state, if it were but to exclude the latter, which ought never to be tolerated in any well-regulated fociety. For, as the whole of this matter is well fummed up by Grotius, "if the compensation allowed by law does not exceed the proportion of the hazard run, or the want felt by the loan, its allowance is neither repugnant to the revealed

if it should be impeached. And although the statute is to be taken strictly, in order

nor the natural law: but if it exceeds those bounds, it is then oppressive usury; and though the municipal laws may give it impunity, they can never make it just," 2 Bla. Com. 455, 456. What shall be a reasonable profit for the loan of money must necessarily depend on a variety of circumstances. In the reign of H. 8. 10l. per cent. was allowed, as the legal rate of interest; but by statute 5 and 6 Ed. 6. c. 20. it is obferved, that the 37 H.S. c. 9. had been construed to give a licence and fanction to all usury not exceeding 10l. per cent. and this construction is declared to be utterly against scripture; and therefore, all persons are forbid to lend or forbear by any device, for any ufury, increase, lucre, or gain whatsoever, on pain of forfeiting the thing, and the usury or interest, and of being imprisoned and fined; and so the law stood till the 13 Eliz. c. 8. which revives the 37 H. 8. c. q. The flatute 21 Jac. 1. c. 17. however, reduced the rate of interest to 81. per cent. and it having been lowered in 1650, during the troubles, to 61. per cent. the same reduction was re-enacted after the restoration, by 12 Car. 2. c. 13. And this rate of interest was reduced to 5l. per cent. by 12 Ann. st. 2. c. 16. by which statute it is enacted, that " all bonds, contracts, and affurances whatfoever, whereupon or whereby more than 51. per cent. shall be directly or indirectly referved or taken, shall be utterly void; and the perfon taking above 51. per cent. for the forbearance of 100l. for a year, shall forfeit treble the value of the monies, &c. fo lent, bargained, &c. These restrictions, however, do not apply to contracts made in foreign

to suppress usury, yet it must be between such parties as make the corrupt agreement, and not to punish others who are not privy to it (b). There is also a difference

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reign countries; for on fuch contracts, "our courts will direct the payment of interest according to the law of the country in which fuch contract was made, Ekins v. East India Company, 1 P. Wms. 396. 2 Br. P. Ca. 72. Thus Irish, American, Turkish, and Indian interest, have been allowed in our courts to the amount of even 121. per cent. For the moderation . or exorbitance of interest depends upon local circumstances; and the refusal to enforce such contracts would put a stop to all foreign trade. See Stapleton v. Conway, 3 Atk. 727. Post. B. 5. c. 1. f. 6. note (a). And by statute 14 G. 3. c. 79. all mortgages, and other fecurities upon estates, or other property, in Ireland, or the Plantations, bearing interest not exceeding 61. per cent. shall be legal, though executed in the kingdom of Great Britain, unless the money lent shall be known at the time to exceed the value of the thing in pledge; in which case, also, to prevent usurious contracts at home, under the colour of fuch foreign fecurities, the borrower shall forfeit treble the sum so borrowed," 2 Bla. Com. 463, 464. But the statute does not extend to perfonal fecurities executed in England. Dervar v. Span, 3 T. Rep. 425.

(b) The statutes declaring the security given on an usurious contract to be utterly void, it necessarily follows, that persons not privy to the transaction may suffer by it; for though they have paid a valuable consideration for the security, as a bill of exchange,

(5) Roberts v. Trema, ne. Cro. Jac. 507. 3 Salk. 390. Cro. Eliz. 643. 1 Atk. 350. Matthews v. Lewis, Antt. Rep. 7.

ence between a bargain and a loan. if the principal is in hazard (5), and the bargain is plain, it is not within the statute of usury (i). But it is otherwise of a loan;

and without notice of the legal objection to its validity, they cannot recover upon fuch fecurity, Lowe v. Waller, Douglas, 708.

(i) In Roberts v. Tremayne, Cro. Jac. 507. these differences are stated to have been taken by Justice Dodderidge. "First, If I lend 1001. to have 1201. at the year's end, upon a casualty, if the casualty goes to the interest only, and not to the principal, it is usury; for the party is sure to have the principal again: but if the interest and principal are both in hazard, it is then not usury. Secondly, If I fecure both principal and interest, if it be at the will of the party who is to pay it, it is not usury; as if I lend to one 100l. for two years, to pay for the loan thereof gol. and if he pay the principal at the year's end, he shall pay nothing for interest, this is not usury; for the party has his election, and may pay it at the first year's end, and so discharge himself." As to the first of these points, it has been determined, that if the substance of the contract be a borrowing and lending, and the contingency is fo flight as to be merely an evafion, and colourable only, it is not fufficient to take it out of the statute, Mason v. Abdy, Carth. 67. Clayton's case, 5 Co. 70. Richards qui tam v. Brown, Cowp. 770. See also Morse v. Wilson, 4 T. Rep. 353. Upon the fecond point, it may be material to observe, that though such an agreement, if bona fide entered into, would not be usurious, yet,

for then it is intended that the principal is in no danger. However, if it be found that

if it were originally agreed that the principal money should not be paid at the time appointed, and that fuch clause was inserted only with an intent to evade the flatute, it feemeth clear, that the whole contract is void: for the construction of cases of this nature must be governed by the circumstances of the transaction, from which the intention of the parties in the making of the bargain will appear; which, if usurious, however difguifed by a specious affurance, will avoid the bargain, 1 Hawk. P. C. 532. The legislature, aware of the many contrivances by which the most wife provisions against usury, if specified, might be defeated, has, in the statute of Anne, purposely inferted the words "directly or indirectly;" and therefore, in all questions, in whatever respect repugnant to the flatute, we must get at the nature and substance of The view of the parties must be the transaction. ascertained, to satisfy the court that there is a loan, and borrowing, and that the substance was to borrow on the one part, and to lend on the other; and where the real truth is a loan of money, the wit of man cannot find a shift to take it out of the statute. If the fubflance is a loan of money, nothing will protect the taking more than 51. per cent.; and though the statute mentions only for loan of money, wares, merchandize, or other commodities, any other contrivance, if the substance of it be a loan, will come under the word "indirectly," per Lord Mansfield, Floyer v. Edwards, Cowp. 114.; therefore, if a man borrow, under colour of buying, it is usurious, ibid. 116.; if it be, however, a bona fide fale of goods, to be paid for at R 2

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that he took 40l. by a corrupt agreement, though it be not within the statute, yet judgment

the expiration of a certain time, or the feller to be allowed fuch an additional profit as exceeds the legal rate of interest, it is not usury, Ibid. See Spurrier v. Mayofs, 1 Vez. Jun. 527. Paterson's case, Cro. Eliz. 104. But though fuch agreement be not usurious, yet, if it be a hard and unconscionable advantage, it shall not be affifted in an action for money had and received, which is an equitable action founded in conscience, Plumbe v. Carter, Cowp. 116. See also Jeston v. Brooks, Cowp. 793. In the case of Chesterfield v. Janssen. 1 Atk. 301. all the cases respecting usury are brought together, and most elaborately discussed; and the rule laid down by Lord Mansfield in the above case of Floyer v. Edwards, feems, in Lord Chesterfield v. Jansfen, to have been agreed to be the true criterion of usury, or not. The most frequently practifed mode of evading the statute is, by treating the transaction as for an annuity instead of a loan; for if a man purchase an annuity at ever fuch an under price, if the bargain was really for an annuity, it is not usury: if on the foot of borrowing or lending money, it is otherwise, P. I. Burnet, 1 Atk. 340. See Richards v. Brown, Cowp. 770. "But though there be a communication for a loan at first, if the final agreement is not to lend, but for the one to fell, and the other to purchase, a real annuity, it is not usury," P. Lord Mansfield, Richards v. Brown, Cowp. 771 Fountain v. Gimes, Cro. Iac. 252. But if the annuity be made redeemable, the court looks upon the transaction as an evasion of the statute of usury, and as only a loan of money, Floyer v. Sherrard, Ambler's Rep. 19. Q. Whether

judgment shall be given against him at common law (6). And, in usurious contracts, there is no doubt but equity will give relief to the borrower, in cases where the law will not reach him; for it is unjust that the lender should go away with fuch exorbitant gains; and the borrower can never be considered as particeps criminis (k), but rather as one deferving compassion

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(6) 2 Roll's .

this rule applies to annuities redeemable at the will of the grantor only? If there be no clause of redemption in the deed, parol evidence will not be allowed to shew that it was so agreed, Lord Portmore v. Morris, 2 Bro. Rep. 219. Hare v. Shearwood, 1 Vez. Jun. 241. Lord Irnham v. Child, I Bro. R. 90.

(k) The borrower was formerly confidered by courts of law in the light of particeps criminis; and upon that ground, in Tomkins v. Bernett, 1 Salk. 22. it was held, that the plaintiff could not recover back what he had paid on an usurious contract: but the liberality of modern times has inclined courts of law to view the borrower in a more favourable light; and as the excess of interest might before have been recovered in equity, fo may it now, in an action for money had and received, Browning v. Morris, Cowp. 792. See also Jaques v. Golightly, 2 Bl. Rep. 1073. Aftley v. Reynolds, Stra. 915. but the plaintiff must, to entitle himself to relief in a civil action, shew that he has done all that equity requires. In an action, therefore, to recover goods which plaintiff had pawned, upon

passion than punishment. And though equity will not go directly contrary to an act of parliament, yet it will often apply a different remedy from what that prescribes (7).

(7) Bosanquet prescribes (7).
v. Dashwood,
Forrest. 38. Proof v. Hines, Forrest. 111.

upon an usurious contract, the court held, that plaintiff must shew that he had tendered all the money really advanced, Fitzroy v. Gwillim, 1 Term Rep. 153. It may be proper, in this place, to remark, that though equity will set aside an usurious contract, upon payment of the principal actually advanced, with interest thereon, yet it will not compel the defendant to discover the usury, if complete, unless the plaintist by his bill offer to waive the penalty, Earl of Suffolk v. Green, Atk. 450. Chauncey v. Tahourden, 2 Atk. 393. Brand v. Cumming, 22 Vin. p. 315. pl. 4.

SECTION VIII.

BUT there are some sorts of gaming and usury not at all prohibited by law or equity; as in case of insurances and bottomry-bonds (1), which are allowed for the

(1) Sharpley v. Hurrell, Cro. Jac. 208. Sayer v.

Gleene, 1 Lev. 54. 1 Sid. 28.

the encouragement of trade(1). Infuring is, where a man for a certain fum takes upon him

(1) It is certain that the hazard may be sometimes greater than the interest allowed by law will compenfate; and this gives rife not only to to infurance and bottomry, but also to respondentia bonds and annuities for lives. As to infurances, it may be fufficient to refer the reader to Mr. Parke's publication, which comprehends not only the learning upon marine infurances, but also the rules and decisions which have been laid down, and which now govern infurances upon lives, or against fire, &c. The reader will likewise find the law of bottomry and respondentia very fully discussed in the fame work: and, as the interference of courts of equity upon these subjects has by the liberal decision of courts of law, been rendered almost unnecessary, it may be fufficient for the editor of this treatife to point out, as occasion may require, the instances in which fuch interference is necessary to the purposes of justice. As to the practice of purchasing annuities for lives at a certain price or premium, instead of advancing the same sum as an ordinary loan, it arises usually from the inability of the borrower to give the lender a permanent fecurity for the return of the money borrowed at any one period of time. He therefore stipulates to repay annually, during his life, some part of the money borrowed, together with legal interest for so much of the principal as annually remains unpaid, as an additional compensation for the extraordinary hazard run of losing that principal by the contingency of the borrower's death; all which confiderations being calculated and blended together, will constitute the just proportion or quantum of the annuity granted. "The real value of that contingency," fays Sir William Blackstone,

him the rifque that goods are to run in transportation from place to place (m). And a policy

Blackstone, " must depend on the age, constitution, fituation, and conduct of the borrower; and therefore, the price of fuch annuities cannot, without the utmost difficulty, be reduced to any general rules: fo that if by the terms of the contract, the lender's principal is bonâ fide, and not colourably put in jeopardy, no inequality of price will make it an usurious bargain; though, under fome circumstances of imposition, it may be relieved against in equity," 2 Bla. Com. 461. In the case of Heathcote v. Paignon, 2 Bro. Rep. Ch. 175. Lord Thurlow feems to have followed this distinction in his observation, that "if mere inadequacy is the ground of rescinding the contract for an annuity, it should feem that it was scarcely sufficient; but there is a difference between that and evidence arifing from inadequacy. If there be fuch inadequacy as to flew that the person did not understand the bargain he made, or was fo oppressed that he was glad to make it, knowing its inadequacy, it would shew a command over him, which amounts to a fraud." It is fcarcely possible to enumerate all the circumstances which may induce a court of equity to rescind such The cases, however, and learning upon the subject, are brought together in the case of Heathcote v. Paignon, and Chesterfield v. Janssen, and furnish at least this rule-that if there be any fraud, either direct or constructive, or the parties appear to be within the range of that policy, which gives to particular descriptions of persons an extraordinary claim to protection, courts of equity will interpose, and give relief. But if the transaction is not chargeable with

a policy of infurance must be construed according to the usage amongst merchants, and the voyage ought to be according to the usage. And the King's Bench takes notice of the laws of merchants, which are general, though not of particular usages (2); for the law merchant is an univerfal law throughout all the world. But insurances are for the benefit of traders and merchants only; and for this end were they at first introduced, that a merchant having a loss might not be undone, many bearing the burthen together: not that others unconcerned in trade, nor interested in the ship, should profit by it (3). And the reason why (3) Goddart v.

(2) Lethullier's cafe, 1 Salk. 443. 1 Ld. Raym.

a man Whittingham v. Thornborough, Pre. Ch. 20.

fraud or imposition, and the parties to it are sui juris, and not in a fituation which gives them peculiar claims to protection, courts of equity, in cases of annuities, will, as do courts of equity, leave money to find its own value; no act of parliament having prescribed any regulation as to the price of annuities. See 17 Geo. 3. c. 26. which prescribes the solemnities requisite to the validity of annuities.

(m) Our author's definition is evidently confined to marine infurance. Sir William Blackstone defines a policy of infurance to be "a contract between A. and B. that upon A.'s paying a premium equivalent to the hazard a man having some interest (n) in the ship or cargo, may insure five times as much, is, because

hazard run, B. will indemnify or infure him against a particular event," 2 Bla. Com. 458. This definition agrees with the "versio periculi of the civilians, in contradistinction to the spei emptio et venditio, which they defined to be a wager.

(n) The practice which formerly prevailed of infuring large fums without having any property on board, which were called infurances, interest, or no interest, and also of insuring the same goods several times over, both of which were a species of gaming without any advantage to commerce, induced the legislature, by the 19 G. 2. c. 37. to enact, that all infurances, interest, or no interest, or without further proof of interest than the policy itself, or by way of gaming or wagering, or without benefit of falvage to the affurer (all which had the fame pernicious tendency), should be totally null and void, except upon privateers or thips upon the Spanish or Portuguese trade; and that no re-affurance should be lawful, except the former infurer should be infolvent, a bankrupt, or dead. It appears from the cases of Goddart v. Garratt, 2 Vern. 269. and Le Pypre v. Farr, 2 Vern. 716. that the court of Chancery had manifested its inclination to supprefs wagering policies, and policies without the benefit of falvage, before the legislature interposed; and it is faid that courts of law had intimated an opinion that policies, interest, or no interest, were formerly bad. Parke's Infurance, p. 296. It is now determined, that a valued policy is not to be confidered as a wager policy, or like a policy, interest, or no interest, Lewis v. Rucker,

because a merchant cannot tell how much, or how little, his sactor may have in readiness to lade on board his ship (4).

(4) Goddart v. Garrett, 2 Vern. 269.

v. Rucker, 2 Burr. 1167. And, therefore, upon valued policies, the merchant need only prove fome interest, because the adverse party has admitted the value; and if more were required, the agreed valuation would fignify nothing: but if it should come out in proof, that a man had infured 2000l, and had interest on board to the value of a cable only, it never has been determined, that by fuch an evafion the act of parliament may be defeated. The effect of the valuation is only fixing conclusively the prime cost. If it be an open policy, the prime cost must be proved, in a valued policy, it is agreed; and for these reasons a bona fide valued policy was held by Lord Mansfield not to be within the 19 G. 2. Lewis v. Rucker, 2 Burr. 1167. See Parke's Infurance, c. 14. where the cases upon this point are collected, and referred to their respective principles.

SECTION IX.

BOTTOMRY, or fœnus nauticum, is so called from the bottom of the ship, a part being put for the whole; for it is indeed in the nature of a mortgage of the ship:

ship: and this is allowed almost every where, by reason of the hazard of the lender (0), and it being found useful for navi-

(o) " The distinction (fays Molloy de Jure Maritimo, b. 2. c. 11. f. 8.) is great, between monies lent to be used in commerce at land, and that which is ventured at fea. In the first, the laws of the realm have fet marks to govern the fame, whereby the avaricious mind is limited to a reasonable profit. The reason of that is, because the lender runs none, but the borrower all the hazard whatever that money brings forth; but money lent to fea, or that which is called pecunia trajectitia, there the fame is advanced on the hazard of the lender, to carry, as is supposed, over sea; so that if the ship perishes, or a spoliation of all happens, the lender shares in the loss, without any hopes of ever receiving his monies; and therefore is called formetimes usura marina, as well as fœnus nauticum; the advantage accruing to the owners from their money arifing not from the loan, but from the hazard which the lender runs." There is another species of loan, called respondentia, which differs from bottomry principally in this, that it is not upon the vessel, but upon the goods and merchandife, which must necessarily be fold or exchanged in the course of the voyage; in which contract the borrower is personally bound, provided the goods are fafe, though the ship perish; whereas, in bottomry, the ship and tackle, as well as the person of the borrower, are liable, though the goods should be lost. These terms are also applied to contracts for the repayment of money borrowed, not on the ship and goods only, but on the mere hazard of the voyage itself. When a man lends a merchant

navigation and commerce (1). Yet a court of equity (p) will never affift a bottomry-bond.

(1) Molloy de Jure Mar. 361. 2Bla.Com. 457. Park's Marine Infurance, 468. Sharpley v.

Hurreil, Cro. Jac. 208. Roberts v. Tremayne, Cro. Jac. 508. Joy v. Kent, Hard. 418. Sayer v. Gleen, 1 Lev. 54. 1 Sid. 27. Chesterfield v. Jansten, 2Vez. 148. 154.

merchant 1000l. to be employed in a beneficial trade, with condition to be paid with extraordinary interest, in case such a voyage should be safely performed; which kind of agreement is fometimes called fœnus nauticum, and fometimes usura maritima. this gave an opening for usurious and gaming contracts, especially upon long voyages, it was enacted, by the 19 G. 2. c. 37. that "all monies lent on bottomry, or at respondentia, on vessels bound to or from the East Indies, shall be expressly lent only upon the ships, or upon the merchandise; that the lenders shall have the benefit of falvage; and that if the borrower has not on board effects to the value of the fum borrowed, he shall be responsible to the lender for so much of the principal as hath not been laid out, with legal interest, and all other charges, though the ship and merchandife be totally loft," 2 Bla. Com. 458. "This statute has intirely put an end to that species of contract which was last mentioned; namely, a loan upon the mere voyage itself, as far at least as relates to India voyages; but as none other are mentioned, and as expressio unius est exclusio alterius, these loans may be made in all other cases as at common law," Parke's Inf. p. 470. But as the allowance of an extraordinary interest is in respect of the risk, it follows, that in all these species of contracts, if the risk is not run, the lender cannot be intitled to the extraordinary premium; for that would be to open a door to means by which

(2) Dandy v. Turner, 1 Eq. Ca. Ab. 372. pl. 7. bond, which carries an unreasonable interest(2); but will leave him to recover at law as well as he can. On the other side, if the obligor goes the voyage, he shall

the flatute of usury might be evaded. See Deguilder v. Depeister, 1Vern. 263.

(p) Mr. Parke observes, that "the case referred to conveys a very unmerited censure upon bottomrybonds, not at all warranted by the long chain of uniform decisions in their favour. Indeed, from the very nature of the contract, they are to carry the naval interest, which is always greater than land interest, in proportion as the rifks run by the lender on bottomry are much greater than those which a lender upon a common bond incurs," Parke's Inf. 478. Though it be true, that the rate of interest allowable on fuch risk is greater than the ordinary rate of interest, it by no means follows, that even the rate of interest agreed on may not be unreasonable, with reference to the risk; and if it be unreasonable, though the transaction be legal, equity cannot, confiftently with the principles which govern its interference, affift a claim founded upon it. It might as reasonably be objected to courts of law, that having determined an agreement not to be usurious, they are bound to give compensation for its non-performance; but it feems to be now fettled, that if compensation for the non-performance of a contract, not strictly illegal, but harsh and unreasonable, be sought in an equitable action, that the plaintiff shall not recover, Plumbe v. Carter, Cowp. 116. in a note to Floyer v. Edwards, Jeston v. Brooks, Cowp. 793.

not be relieved here, upon pretence that the deviation was of necessity, saving as to the penalty (3). And if the ship, though loft, has deviated from the voyage mentioned in the bond, the obligee may recover the money on the policy of infurance, and also put the bottomry bond in 2 Ch. Ca. 130. fuit; for the insurers might as well pretend to have aid of the bottomry-bond, as the obligor of the money recovered on the policy (4).

(3) Western v. Wildy, Skin. 59. 152. Williams v. Steadman, Holt's R. 126. Anon. 1 Eq. Ca. Ab. 372. pl. 5.

(4) Harman v. Vanhatten, 2 Vern. 717.

SECTION X.

TT was also a rule in the civil law (1), that marriage ought to be free; and the same policy has obtained in equity (q). And.

(1) Dig. lib. 35. tit. 1. 1. 62, 63,

(q) The civil law, as a system of jurisprudence framed by wife men, and approved by the experience of many ages, must, in every country, and in every age, furnish principles, which, modified and applied as the altered circumstances of the times may require, will greatly contribute to the real interests and welfare of fociety; but if the fame system be drawn out

And, therefore, in case of a bond in common form for payment of money, but proved

to its full extent, and applied without any regard to the change which may have taken place in the opinions and manners of mankind, it must, notwithstanding its general wisdom and utility, prove in many particulars defective, and infufficient to the purposes, which, in its original application, it was most admirably calculated to accomplish. The institution of marriage, whether it be confidered as a religious institution, or, according to the opinions of fome, as a merely positive and focial inflitution, will still be found to involve confequences more extensively and more feriously interesting to society than any other institution whatsoever. See Spirit of Laws, b. 23. c. 2. To fecure to fociety all the advantages which fuch an inflitution is calculated to produce and confer, it feems to be peculiarly important that the law should secure to individuals that freedom of choice, which is necessary to reconcile the happiness of individuals with the welfare of the state: and with a view to fo defirable an object, the civil law appears to have marked a disposition particularly anxious to remove every obstacle which might deter individuals from entering into a state so favourable to the interests of the public. See Digest, lib. 35. tit. 1. f. 62, 63, 64. But it is observable, that whilst the confideration of the public welfare was allowed to operate, as far as was confiftent with the freedom of individuals in general, it was not allowed to break in upon those domestic claims which stood in need of the protection of the state; and therefore, though conditions in restraint of marriage were held generally void, and even a condition si à liberis ne nupserit was

proved that the agreement was, that the obligor should marry such a man, or should pay

not allowed to prevail, yet a condition si à liberis impuberibus ne nupferit, would be good, Digeft, lib. 35. tit. 1. c. 62. f. 2. And the reason of this distinction is affigned, "quia magis cura liberorum quam viduitas injungeretur." A reason, which our law has known how to extend; and which, by receiving its true direction, and fair and rational operation, has led to many distinctions in our fystem, which seem to have escaped the vigilant policy of the civil law. It may be laid down as a fundamental proposition, that marriage ought to be free; by which is intended, that as the parties contracting are principally interested in the contract, they ought to possess all those faculties which are requifite to the validity of every other species of contract, which Puffendorff defines to be, 1st, A phyfical power; 2dly, A moral power of confenting; 3dly, A ferious and free use of them; the rather, as the contract of marriage is connected with more important confequences than any other species of contract, inasmuch as it is less easily diffolved; and though diffolved, if there be children, many of its confequent ties remain. But though it be true, that freedom from restraint, as it encourages this species of contract, is of importance to the state, it must not be considered as a principle to be purfued to its whole extent, and at every hazard; for if it were, it would be found, that this principle, the well-regulated and bounded influence of which is capable of inducing real benefit to fociety, is, in its excess or abuse, like other good principles. destructive of the very interests which it professes to confult. The claims of parental authority, controlled VOL. I.

pay the money due on the bond; the court will decree this bond to be delivered up to be

as they are by the law of England, merit confiderable respect: nor has the right which individuals have of qualifying their bounty been difregarded. The only restrictions which the law of England imposes, are fuch as are dictated by the foundest policy, and approved by the pureft morality: That a parent profesting to be affectionate shall not be unjust; that professing to affert his own claim, he shall not disappoint or control the claims of nature, nor obstruct the interests of the community; that what purports to be an act of generofity, shall not be allowed to operate as a temptation to do that which militates against nature, morality, or found policy, or to refrain from doing that which would ferve and promote the effential interests of society; are rules which cannot reasonably be reprobated as harsh infringements of private liberty, or even reproached as unnecessary restraints on its free exercife. See Puff. Law of Nature and Nations, b. 6. c. 2. f. 14. On these confiderations are founded those distinctions which have, from time to time, been recognised in our courts of equity, respecting testamentary conditions, with reference to marriage. The cases upon the subject are very many, and not immediately reconcileable: to bring them together, and to point out their respective distinctions, is all the editor of this treatise professes to do. To draw out the principles upon which they proceeded to their whole extent, and to illustrate them by a view of the policy which informs them, is an undertaking, though well deferving attention, of too great magnitude to fall within the range of this work.

be cancelled, as being contrary to the nature and defign of marriage, which ought

to

In deciding upon the validity of any condition of marriage, it is necessary to advert to the nature of the estate charged with the gift, to which such condition is annexed. 1. If the estate charged be real estate; then it is material to determine, whether fuch condition be precedent or subsequent. 2. If the estate charged be personal; the force or validity of the condition will depend on its reasonableness; as also on the gift being given over, or not given over .- 1. Where the gift or devise, to which a condition of marriage is annexed, is of land, or a charge on land, it feems fettled, that if fuch condition of marriage be precedent, it must be strictly performed, in order to intitle the party claiming to the benefit of fuch gift, Bertie v. Lord Falkland, 3 Ch. Ca. 130. 2 Vern. 338, 339. 2 Freem. 220. Fry v. Porter, 1 Mod. 300. Reeves v. Hearne, M. 4 G. 2. 5 Vin. Ab. 343. Harvey v. Aston, 1 Atk. 361. Pullen v. Ready, 1 Wils. 21. Reynish v. Martin, 3 Atk. 330. 1 Wilf. 130. Randal v. Payne, I Bro. C. R. 55. For interests arising out of land shall be governed by the rules of the common law, Co. Litt. 206. a. b. 217. a. Popham v. Bamfield, 1 Vern. 83. Chauncey v. Graydon, 2 Atk. 616. If the condition be subsequent, its validity will depend on its being fuch as the law will allow to diveft an estate. See Co. Litt. 206. b .- 2. If the gift or legacy, to which a condition of marriage be annexed, be charged on perfonal estate, such condition, except under the circumstances after mentioned, shall, according to the rule of the civil law, be confidered as merely in terrorem; but if the gift or legacy be given over,

in

(2) Key v. Bradfhaw, 2 Vern. 102. See alfo Drury v. Hooke, 3 Vern. 412. to proceed from free choice, and not from any compulfion (2). So wherever a mother

in the event of the condition being broken, then the condition shall be allowed to prevail: fee Pigot's case, cited by Winch, J. in Grifley v. Lother, Moore's Rep. 857. Norwood v. Norwood, 1 Ch. R. 65. Bellafis v. Cromin, I Ch. Ca. 22. Sutton v. Jewks, 2 Ch. Rep. 50. Jervois v. Duke, 1 Vern. 19. Rightfon v. Overton, 2 Freem. 21. Anon. 1 Freem. 302. Davis v. Hatton, cited 2 Freem. 10. Hicks v. Pendarvis, 2 Freem. 41. Garrett v. Pritty, 2Vern. 293. Semphill v. Bayley, Pre. Ch. 562. Stratton v. Grymes, 2Vern. 357. Pigolt v. Morris, Sel. Ca. Ch. 26. Pulling v. Ready, 1 Wilf. 21. Reynish v. Martin, 1 Wilf. 130. 3 Atk. 330. Wheeler v. Bingham, 3 Atk. 364. Harvey v. Aston, Forrest. 212. Graydon v. Hicks, 2 Atk. 16. Chauncey v. Tahourdin, 2 Atk. 392. Chancev v. Fenhoulet, 2Vez. 265. Long v. Dennis, 4 Burr. 2052. Hemmings v. Minchley, 1 Bro. Ch. Rep. 303. Scott v. Tyler, 2 Bro. Ch. Rep. 431. With respect to what shall amount to a bequest over; and in particular, whether a bequest or devise of the residue is sufficient to support the condition, see Paget v. Haywood, cited 1 Atk. 378. Rolls, Nov. 1733. Wheeler v. Bingham, 3 Atk. 364. Garratt v. Pritty, 2 Vern. 293. Semphill v. Bailey, Pre. Ch. 562, and Lady Kilmury's case, cited in Parker v. Parker, 2 Freem. 59. Amos v. Horner, 1 Eq. Ca. Ab. 112. Scott v. Tyler, 2 Bro. C. R. 463.

It must not be inferred, from the frequent instances of conditions in restraint of marriage being declared void, that all conditions annexed to personal gifts, which ther or father, or guardian, infift upon a private gain, or fecurity for it, and obtains

which in any manner affect marriage, are void, unless given over; for the fame principles of policy, which annul fuch conditions when they tend to a general reftraint of marriage, will favour and support them when they merely prescribe such provident regulations and fanctions as tend to protect the individual from those consequences, to which an over hasty, rash, or precipitate match would probably lead: "therefore, if the conditions are only fuch, whereby a marriage is not altogether prohibited, but only in part restrained, as in respect of time, place, or person, then such conditions are not utterly rejected," Godolp. Orp. Leg. Part 1. c. 15. f. 1. "An injunction to ask consent is lawful, as not restraining marriage generally; a condition, that a widow shall not marry, is not unlawful; an annuity during widowhood; a condition, to marry or not to marry Titius, is good; a condition, prescribing due ceremonies and place of marriage, is good; ftill more is a condition good, which only limits the time to twenty-one, or any other reasonable age, provided it be not used evasively to restrain marriage generally," P. Lord Thurlow, C. Scott v. Tyler, 2 Bro. C. Rep. 488.

Courts of equity having allowed conditions of marriage, under certain circumstances, to prevail, have, however, constantly marked an anxious inclination to guard against that abuse, to which the giving one person any degree of control over another might eventually lead. In Daley v. Desbouverie, 2 Atk. 261. Lord Hardwicke, C. observes, that "persons, whose consent

(3) Lamlee v. Hanman. 2 Vern. 499. D. of Hamilton v. Mohun, 2 Vern. 652: 1 P. Wms. 118. 1 Salk. 158. tains it of the intended husband, it shall be set aside(3); for the power of a parent or guardian ought not to be made use of to such purposes. You shall not have my daughter, unless you do so and so, is to

Kent v. Allen. 2 Vern. 588 Pre. Ch. 267. Tooke v. Atkins, 1 Vern. 451. Kemp v. Coleman, 1 Salk. 156. Cole v. Gibson, 1 Vez. 503. Hylton v. Hylton, 2 Vez. 547. Pierse v. Waring, 13th Nov. 1745, Ch.

is required to a marriage, ought to confider themselves in the light of a parent, and readily confent, where there is no ferious objection to the marriage." In Harvey v. Aston, Mr. Justice Comyns states, that "where the condition has been performed to a reasonable intent, the court has difpenfed with the want of circumstances; as where the major part of the trustees confent, or where the trustees give an implied, not an express consent," Daley v. Clanrickarde, 10th Dec. 1738, Ch. Burlton v. Humphreys, 20th Feb. 1755, Ch. cited in Long v. Dennis, 4 Burr. 2056. So where the father has made the marriage himself, 1 Atk. 375. Mesgrett v. Mesgrett, 2 Vern. 580. Clerk v. Berkley, 2 Vern. 721.: where the condition is become impossible, by the perfon dying whose consent was necessary before the marriage, it is an excuse, Graydon v. Hicks, 2 Atk. 16. See also Peyton v. Bury, 2 P.Wms. 626.: nor will a court of equity require the confent beyond the minority of the legatee, Knapp v. Noyes, Amb. 662. Gilbert's Hist. Ch. Lex Prætoria, 337. Not only conditions imposed by others, in restraint of marriage, are generally void; but also obligations by the parties themfelves are void, if they be restrictive of marriage in general, Baker v. White, 2 Vern. 215. Woodhouse v. Shipley, 2 Atk. 535. Lowe v. Peers, 4 Burr. 2225.

fell children and matches (r). And these contracts with the father, &c. feem to be of the same nature with brokage-bonds, &c. but of more mischievous consequence, as that which would happen more frequently; and it is now a fettled rule, that if the father, on the marriage of his fon, takes a bond of the fon to pay him fo much, &c. it is void, being done by coercion, while he is under the awe of his father. Nor will the court only decree a marriage brokage-bond to be delivered up, but a gratuity of fifty guineas actually paid to be refunded (4); for fuch (4) Goldsmith bond is in no case to be countenanced.

v. Browning, 2 Vern. 392.

(r) From the case of Grisley v. Lother, Hob. 10. it fhould feem, that though the procuring of a marriage is not a confideration in equity, it is a fufficient confideration in law; and of that opinion Holt, C. J. appears to have been in Hall v. Potter, 3 Lev. 411.; and the circumstance of the bond, in that case, having been ultimately cancelled by the decree of the House of Lords, does not affect the rule of law, as that decision was upon an appeal from the decree in equity, which had held the bond to be good-Show, P. C. 76. as courts of equity do not, in fuch cases, interpose for the particular damage to the party, but from confiderations of public policy, marriage greatly concerning the public, fee Law v. Law, Forrest. 142. Q. Whether the vice of fuch confideration could not now be pleaded at law? Collins v. Blantern, 2 Wilf. 347.

And

(5) Baker v. White, 2 Vern. 215. Woodhouse v. Shipley, 2 Atk. 535. Lowe v. Peers, 4 Burr. 2225.

And a bond to procure marriage, though between persons of equal rank and fortune, is void, as being of dangerous confequence (s). So if A. being a widow, gives a bond to B. of 20l. if she should marry again, and B. gives a bond to the widow to pay her executors the like fum if she did not marry again (5), and the widow foon after marries, her bond will be decreed to be delivered up (t). the difference which some take, where it is a bond penal, whereon the jury can give no less than the penalty, and the case (of a promise) where the jury will, as cause is, lessen, &c. seems not to be law: but the agreement void in both cases. And so in restraints of trade, the distinc-

tion

⁽s) That equity will relieve against bonds to strangers for the procuring of marriage, see Arundel v. Trevilien, 1 Ch. Rep. 47. Glanville v. Jennings, 3 Ch. Rep. 18. Toth. 27. Drury v. Hook, 2 Ch. Ca. 176. IVern. 412. Cole v. Gibson, I Vez. 503. Smith v. Aykwell, 3 Atk. 566. And as these contracts are avoided, on reasons of public inconvenience, the court of Exchequer, in Shirley v. Martin, 14th Nov. 1779, held, that they would not admit of subsequent confirmation by the party.

⁽i) Q. If such bond is not relievable at law? Lowe v. Peers, 4 Burr. 2225.

tion is not between bonds and promifes, as is laid down in some books; but it is between bonds, covenants, or promifes with consideration, and such as are without (6): for the first, if only with respect to a particular place or person, may be just and reasonable; nor is it against magna charta; for that only provides against power and sorce, that a man be not disserted of his liberty or estate, but he may sell either. Whereas the other, for aught appears, may be oppressive, and is of mischievous consequence to the public (u).

(6) Mitchell v. Reynolds, 1 P.Wms. 181.

(u) This subject is most elaborately discussed in the judgment given by C. J. Parker, in Mitchell v. Reynolds, 1 P. Wms. 181. and the notes furnished by Mr. Cox refer with the usual accuracy of his edition to the modern cases. See also Davis v. Mason, 5 Term Rep. 118.

SECTION XI.

AND, in the civil law, counter-letters, and all fecret acts which make any change in agreements, are of no manner

(1) Payton v.
Bladwell,
1 Vern. 240.
Redman v.
Redman,
1 Vern. 348.
Gafe v. Lindo,
1 Vern. 475.
Lamlee v. Ham

of effect, with respect to the interest of a third person (1); for this would be an infidelity contrary to good manners and the public interest (x). So private agreements,

Lamlee v. Haman, 2 Vern. 466. Middleton v. Onflow, 1 P. Wms. 768. Pitcairne v. Og-bourne, 2 Vez. 375. Montefiori v. Montefiori, 1 Bia. Rep. 363.

(x) In cases of this nature, it is not necessary that the fraud respect an article expressly contracted for; but any representation, misleading the parties contracting, on this subject of the contract, is within the principle which governs this class of cases: see Neville v. Wilkinson, I Bro. Rep. 543. and stated in Mr. Cox's note to Roberts v. Roberts, 3 P. Wms. 74. in which case "Lord Thurlow, C. relieved by injunction against a bond entered into by the plaintiff to the defendant, before the plaintiff's treaty of marriage; the defendant having, by the plaintiff's defire, upon the occasion of such treaty, misrepresented to the wife's father, the amount of the plaintiff's debts, and particularly concealed from him the bond in question: and this relief was given, although it did not appear, that there was any actual stipulation, on the part of the wife's father, in respect of the amount of the plaintiff's debts." The principle of this rule, though it has been most frequently applied to agreements contra fidem tabularum nuptialium, extends to every other species of agreements; therefore, if A. agree to give B. a certain fum for goods in advancement of C. any fecret agreement between B. and C. that the latter shall pay a further fum is void, Jackson v. Duchaire, 3 Term Masters v. Fuller, 4 Bro. Rep. 19. Rep. 551. where a tradefman compounding his debts, privately agreed with some of his creditors to pay them the whole

in derogation of marriage-articles are all fet aside in equity (2). As where the daughter promised to repay 10l. part of the marriage-portion of gol. this is a fraudulent and void promise (3). So where A. having a kindness for B. treated a mar-

(2) Morrison v. Arbuthnot, 5 Vin. Ab. 534. pl. 40. Sir P. Butler v. Sir H. Chauncy, cited 1 Eq. Ca. Ab. 88, 89. in Gifford v. Gifford,

which states a distinction. (3) Collins v. Willis and wife, Cro. Eliz. 774.

whole of their debts, by which they were induced to appear to accept of the composition; such private agreement was held to be a fraud on the other creditors, Child v. Danbridge, 2 Vern. 71. Small v. Brackley, 2 Vern. 602. Spurrett v. Spiller, 1 Atk. 105. Cecil v. Plaistow, Anstr. Rep. 202. Jackson v. Lomas, 4 T. Rep. 166. And it feems that fuch fraud is now relievable at law, Cockshott v. Bennett, 2 Term Rep. 763. The case of Lewis v. Chase, 1 P. Wms. 620. is however irreconcileable with this principle; it may therefore be material to observe, that it is very much shaken, if not over-ruled, by feveral fubfequent cases, particularly Smith v. Bromley, Dougl. 670. But though private agreements in fraud of third persons be void, yet if a bond or note be given by A. the more effectually to enable B. to bring about a match, &c. fuch bond or note may be recovered upon at law, Montefiori v. Montesiori, 1 Bla. Rep. 363. so if a third person give his bond, or fecurity, to procure the certificate of a bankrupt, Keye v. Bolton, 6 Term Rep. 134. See also Feise v. Randall, 6 Term Rep. 146. But see Fawcett v. Gee, Exch. E. T. 1797.; and a conveyance of land for fuch purpose, notwithstanding a defeazance, will be fustained in equity, Webber v. Farmer, 13 Vin. Ab. 525. 2 Bro. P. C. 88.

(4) Stribblehill v. Brett, 2 Vern. 445. Pre. Ch. 165.

(5) Galev. Lindo, 1 Vern. 475. Redman v. Redman, 1 Vern. 348.

(6) Lamlee v. Hanman, 2 Vern. 500.

riage for him with C. for his niece, and a fettlement being agreed upon for 2500l. portion, he obtained a redemise of part of the estate settled for present maintenance, and a release of what A. had covenanted to fettle after his death; and both fet aside in equity (4). So where the brother gave a bond to make up his fifter's portion the fum that was infifted on, but took a bond from her before marriage to repay. The husband died, the wife survived, and was relieved against the bond (5). From which cases it may be collected, that what is the open and public treaty and agreement upon marriage shall not be lessened, or any ways infringed, by any private treaty or agreement (6). And that which was once a fraud, will always be fo (y); and the woman furviving the hufband, will not better the case, nor the affignment of fuch a bond to creditors; for a bond, affignable only in equity, is still liable

(y) Quod ab initio non valet tractu temporis non convalescet is the rule of law, and governs the distinctions upon the subject of, confirmation in equity. Sec ch. 2. s. 13. note (r), p. See also Cockshott v. Bennett, 2 Term Rep. 763. But this rule does not extend to subsequent bona fide purchasers.

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to the same equity as if remaining with the obligee (7); and as to any promife made afterwards to pay it, that was but nudum pactum, and not binding (8). So a fettlement made by a woman before her marriage, for her separate use, without the husband's privity, shall not bind the husband (9), being in derogation of the rights of marriage. But where a widow, before her marriage with a fecond hufband, affigned over the greatest part of her estate to trustees for children by her former husband (z); it is certain a widow might with a good conscience, before she put herself under the power of a second husband, provide for the children she had by the first (10).

(7) Coles v. Jones, 2 Veru. 692. Weyman v. Weyman, 5 March 1739. Bellow's MSS. 305. Turton v. Benfon, 2 Vern, 764. 1 P. Wms. 496. Pre. Ch. 522. 10 Mod. 445. Cator v. Burke, 1 Bro. Rep. 434. (8) Gale v. Lindo, 1 Vern. 475. (9) Howard v. Hooker, 2 Ch. Rep. 42. Carlton v. Dorfett, 2 Vern. 17. Draper's cife. 2 Freem. 99. Gilbert's Lex. Prætoria, 267. Poulson v. Wel-

lington, 2 P. Wms. 535. But fee Countes of Strathmore v. Bowes, 2 Bro. Rep. 345. See c. 2. f. 6. note (0). p. 98, 99. (10) Hunt v. Matthews, 1 Vern. 408. King v. Cotton, 2 P. Wms. 358. 674. Newstead v. Scarle, 1 Atk. 265. Doe v. Routledge, Cowp. 705. Exparte Marsh, 1 Atk. 158.

(z) It feems agreed, that if a woman on the point of marriage charge or convey her property to a mere stranger, for whom she was not under even a moral obligation to provide, that such conveyance will be decreed a fraud on the marital rights, Lance v. Newman, 2 Ch. Rep. 41. Blanchett v. Foster, 2 Vez. 264.

SECTION XII.

A ND, by the civil law, whatever debtors do to defeat their creditors is (1) Dig: lib. void (1), and there is a great refemblance 42, ti. 8, 1, 6. 1. 8 Domat's between the civil law in this matter and the statute of 13 El. (a). But in each of them

> (a) The 13 Eliz. c. 5. not only declares all deeds made in fraud of creditors to be null and void, but fubjects the parties to such fraud to certain penalties and forfeitures: from which circumstance it should seem that the provisions of this act ought to be construed Lord Mansfield, however, in Cadogan v. Kennett, Cowp. 434. observes, that "the statutes 13 Eliz. c. 5. 27 Eliz. c. 4. cannot receive too liberal a conftruction, or be too much extended in suppression of fraud." 3 Rep. 82. 2 Atk. 205.

> The object of the legislature was evidently to protect creditors from those frauds which are frequently practifed by debtors, under the pretence of discharging a moral obligation; for as to those gifts or conveyances which want even a good or meritorious confideration for their support, their being voluntary feems to have been always a fufficient ground to conclude that they were fraudulent; but though the flatute protects the legal right of creditors against the fraud of their debtors, it anxiously excepts from such imputation the bona fide discharge of a moral duty. It therefore does not declare all voluntary conveyances, but all fraudulent conveyances to be void, I Ch. Ca. 99. 291. I Vent.

Civil Law, B. 2. ti. 10. f. 1, 2.

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them there was this exception, that it should not extend to avoid any estate or interest,

194. 1 Mod. 119. 1 Atk. 15. Cowp. 708. and whether the conveyance be fraudulent or not, is declared to depend on the confideration being good and bonâ fide. This leads to the inquiry what shall be deemed a good confideration, and what is intended by requiring a conveyance for such confideration to be also bonâ fide. A good confideration is that of blood, or of natural love and affection, 2 Bla. Com. 297. and a gift made for fuch confideration ought certainly to prevail, unless it be found to break in upon the legal rights of others; but if it does break in upon fuch rights, it is equally clear that it ought to be set aside: if therefore a man being indebted convey to the use of his wife or children, fuch conveyance would be within the statute; for though the confideration be good, yet it is not bona fide; that is, the circumftances of the grantor render it inconfistent with that good faith which is due to his creditors.

"If there be (fays Lord Hardwicke) a voluntary conveyance of real estate or chattel interest by one not indebted at the time, though he afterwards becomes indebted, if that voluntary conveyance was for a child, and no particular evidence or badge of fraud to deceive or defraud subsequent creditors, that will be good; but if any mark of fraud, collusion, or intent to deceive subsequent creditors appear, that will make it void," Townsend v. Wyndham, 2 Vez. 11. See also Stileman v. Ashdown, 2 Atk. 481. Doe v. Routledge, Cowp. 711. Russell v. Hammond, 1 Atk. 13. This distinction is drawn from considerations too obvious to require

(2) 13 Eliz. c. 5. f. 6. Twine's cafe, interest, &c. made upon a good consideration and bona side (2). And therefore if a man

3 Rep. 81. a. Shepperd's Touchstone, p. 65. 2 Com. Dg. Covin.

require illustration from cases; for if a man indebted were allowed to divest himself of his property in favour of a wife or child, his creditors would be defrauded; but if a man not indebted could not make an effective fettlement in favour of fuch objects, because by possibility he might afterwards become indebted, it would destroy those family provisions, which are under certain restrictions, a benefit to the public, as well as to the individual objects of them. See Walker v. Burrows, 1 Atk. 94. It may however be material to observe, that the grantor being indebted, is not the only badge of fraud; feveral other circumstances are enumerated in Twyne's cafe, 3 Co. 82. as furnishing a strong prefumption that the transaction is mala fide. If the conveyance contain a power of revocation, or a power to mortgage, it will be confidered as fraudulent against creditors, Tarback v. Marbury, 2 Vern. 510. if the grantor be allowed to continue in possession, the conveyance being absolute, Stone v. Grubham, 2 Bulft. 218. or if the conveyance or gift be of the whole or greater part of the grantor's property, fuch conveyance or gift would be prefumed to be fraudulent; for no man can voluntarily divest himself of all, or the most of what he has, without being aware that future creditors will probably fuffer by it. In short, if the transaction be chargeable with any circumstance sufficiently strong to raise a presumption of its being a fraud, it cannot be supported unless some other confideration be interposed to obviate the objection arising from the general nature of the transaction; as where the hufband

a man steals a young lady who has a confiderable fortune in trustees hands, and the

band after marriage being indebted, conveyed an effate to trustees, to the separate use of his wife; it was held that the trustees, having undertaken to indemnify the husband against the wife's debts, was sufficient to support the fettlement, as made for a valuable confideration, Stevens v. Olave, 2 Bro. Rep. 90. But if this transaction had been with a view to defraud creditors, it would probably have been fet afide; for "if the tranfaction be not bonâ fide, the circumstance of its being even for a valuable confideration, will not alone take it out of the statute," per Lord Mansfield, Cadogan v. Kennet, Cowp. 434. Stileman v. Ashdown, 2 Atk. 477. The cases of Jones v. Marsh, Forrest. 64. and Hungerford v. Earle, 2 Vern. 261. may be thought to weaken the authority of the distinction taken by Lord Hardwicke in Townsend v. Windham; Lord Talbot having, in Jones v. Marsh, declined giving any opinion how far a family fettlement, without confideration, would be fraudulent against subsequent creditors, though the party was not indebted at the time; and Hutchins, Lord Commissioner, having held fuch fettlement to be void. It is observable, however, that Lord Talbot was not, by the circumstances of the case before him, called upon to give his opinion; and that the opinion of Hutchins, Lord Commissioner, was evidently influenced by the provisions of the fettlement not having been purfued.

But though creditors may, under fome circumflances, avoid a voluntary conveyance, yet it is binding on the party, and all claiming under him, as volun-Vol. I.

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teers, the husband gives a judgment to make a settlement upon her, equity will not set this aside in behalf of creditors, though the settlement was after marriage, and voluntary (3); for the court would not have let the husband have had the fortune without making a settlement (b). And the

(3) Moor v. Rycault, Pre, Ch. 22. Colvile v. Parker, Cro. Jac. 158. Hinton v.

Scott, Moseley, 336. Middlecome v. Marlow, 2 Atk. 519. Ward v. Shallett, 2 Vez. 16. Hilton v, Biscoe, 2 Vez. 308. Wheeler v. Caryll, Amb. 121, Cappodoce v. Peckham, 4 May 1792, Ch. See c. 2. 5, 6. note (k), p. 88.

teers, Hawes v. Leader, Cro. Jac. 270. Brookbank v. Brookbank, 1 Eq. Ca. Ab. 168. Rand v. Cartwright, Nelfon, 101. 22 Vin. Ab. 18. Franklin v. Thornbury, 1 Vern. 132. Villers v. Beaumont, 1 Vern. 100. Bale v. Newton, 1 Vern. 464. Lord Lincoln's cafe, cited in Clavering v. Clavering, 2 Vern. 475. Sneed v. Culpepper, 22 Vin. Ab. 24. pl. 3. and if there be two or more voluntary conveyances, the first shall prevail, unless the latter be for payment of debts, Goodwyn v. Goodwyn, 1 Ch. Rep. 92. 2 Ch. Rep. 100. But a voluntary conveyance is not binding on the affignees of the grantor, if he become a bankrupt, for they have all the equity the affignees have, and may inspect transactions which the bankrupt could not. Anderson v. Maltby, 2 Vez. jun. 255. But see Innes v. Baugh, 22 Vin. p. 22. E pl. t.

(b) It is observable that in the cases referred to, the court does not appear to have adverted to the amount of the settlement; a circumstance which in some cases, may deserve consideration; for as the equity of the wife does not extinguish the legal right of the husband,

the statute did not mean to alter the nature of the debt: fo that if the debt do not bind the heir, but merely the perfonal affets, it will not affect a volunteer with power of revocation, unlefs reduced to a judgment during the life of the debtor (4). And even a debt that does affect the heir will not bind a purchaser of the volunteer with notice, till it is placed upon the land by the judgment; for if it were otherwise, personal fecurity would be turned into real fecurity (5). And some think that fraudulent conveyances are made fo only by the feveral statutes made for that purpose. And therefore if the debtor makes a purchase in trustees names, he may declare the trust to whom he pleases; for he might have given him the money to have made the purchase himself; and it is a new pretence to fay a man made a purchase fraudu-

(4) Parslowe v. Weedon, T. 1718. i Eq. Ca. Ab. 149. But fee Forreft. 64. where the above cafe is observed upon. (5) Gilbe t's Lex Piætoria, 293, 294. Prodgers v. Langham, 1 Siderf. 133.

it were not too much to contend, that if the settlement by the husband, he being indebted at the time, went beyond what the court would have enforced, that such settlement, as to excess, was a fraud on the creditors. That the equity of the wife may be satisfied by less than the amount of her fortune. See Worrall v. Marlar, 1 P. Wms. 459. in a note, Cox's Ed. but see Like v. Beresford, 3 Vez. 506.

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(6) Fletcher v. Sidley, 2 Vern. 490. Kingdome v. Bridges. 2 Vern. 67.

lently (6). But although regularly for cases within the statute relief must be had at law, yet if goods are given to defraud creditors, in such a case as the gift is not avoidable by the statutes, the party may be relieved here (c); for this court determined concerning charities and frauds long before any statute made concerning the same (7).

(7) Hungerford v. Earl, 2 Vern. 262.

White v. Huffey, Pre. Ch. 13, 14. Colfton v. Gardner, 2 Ch. Ca. 43-

(c) The statutes, 50 Ed. 3. c. 6. 3 H. 7. c. 4. expressly declare all gifts, &c. of goods and chattels, intended to defraud creditors, to be null and void. Creditors might however still, in some cases, be defrauded, by their debtors executing powers of appointment in favour of mere volunteers, unless courts of equity interposed, and made such voluntary appointment primarily subject to the payment of debts. Thompson v. Town, 2 Vern. 319. Lassels v. Lord Cornwallis, Townsend v. Wyndham, 2 Vez. 1. 2 Vern. 465. But though courts of equity will subject a voluntary appointment to the payment of debts, yet they will not interpofe where the debtor has not executed his power of appointment. Lassells v. L. Cornwallis, 2 Vern. 465. Townsend v. Wyndham, 2 Vez. 1. See also Pease v. Stileman, Hob. 9. as to the rule of law; and query, whether an executor is such an assignee as will entitle him to claim the fund the subject of appointment, Hob. 9, 10.

SECTION XIII.

AND these statutes, made against frauds, are for the public good, and therefore to be taken by equity (1), and bind the king (2); and the word (declare) in the act of 13 Eliz. shews (3) it was the common law before (d). Nor does that act extend only to creditors, but to all others who have any cause of action (e)

(1) Gooch's cafe, 5Co. 6o. a. See fect. 12. note (a).
(2) Magdalen College's cafe, 11 Co. 72.
2 Init. 681. See Rix v. Porlington, 1 Salk. 162.
(3) Co. Litt. 76. a. 290.

or

- (d) At common law, fraudulent gifts or conveyances were avoidable by persons, creditors at the time such gift or conveyance was made, but not by subsequent creditors, Twine's case, 3 Co. 83. a. Upton v. Bassett, Cro. El. 444. Dyer, 294, 295. The statute 13 Eliz. c. 5. has also superadded certain penalties, to which the parties to a fraudulent gift or conveyance were not subject at common law.
- (e) In the case of Luckner v. Freeman, Pre. Ch. 105. a distinction appears to have been taken between the claims of real creditors and a debt founded in maleficio; for A. having brought an action against B. for lying with his wife, B. assigned his estates to trustees in trust to pay the several debts mentioned in a schedule, and such other debts as he should name. A. recovered 5000l. damages, and brought his bill to set assigned this deed as fraudulent; but the court held that it was not fraudulent either in law or equity; for that the plaintiss was no creditor at the making of the deed; and though it were made with an intent to prefer his real

(4) 3 Co. 82. a. Leonard v. Bacon, Cro. Eliz.

or fuit, or any penalty or forfeiture, either to the king or the subject; as for felony, outlawry, recufancy, or the like (4). But there is a difference between purchasers and creditors; for the statute of 13 El. makes only fraudulent conveyances void against creditors; but in the case of a purchaser, all voluntary conveyances are void by the express letter of the 27th Eliz. (5) without more (f). And the notice

(5) C. 4.

real creditors before this debt, when it came afterwards to be a debt, yet it was a debt founded only in maleficio, and therefore it was conscientious in him to prefer the other debts before it. But the plaintiff was held to have an interest in the surplus after payment of the other debts.

(f) The second section of the 27 Eliz. enacts, that all conveyances, &c. of lands, made with an intent to defraud and deceive fuch perfons, &c. as shall purchase such lands, &c. for money or other good consideration, shall be utterly void; the fourth section exprefsly excepts conveyances made upon good confideration and bona fide.

On the construction of this act it has been held, that every voluntary conveyance shall be presumed to be fraudulent against a subsequent purchaser. Bovey's case, IVentr. 194. Douglas v. Ward, I Ch. Ca. Holford v. Holford, 1 Ch. Ca. 217. Colville v. Parker, Cro. Jac. 158. But if the conveyance, notice of the purchaser, viz. of the fraud (g), cannot make that good which

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though voluntary, appear to have been made for a meritorious confideration, and without fraud or covin, it shall not be void against a subsequent purchaser; for "there is no part of the act which affects voluntary fettlements eo nomine, unless they are fraudulent," Doe v. Routledge, Cowp. 708. Hamerton v. Milton, 2 Wilf. 356. Tri. T. 1795. See Myddleton v. Ld. Kenyon, 2 Vez. Jun. 410. Jones v. Marsh, Forrest. Sagittary v. Hide, 2Vern. 44. As to what shall be deemed a meritorious confideration, fee the above cases, and also Hunt v. Matthews, IVern. 408. Jennings v. Sellack, I Vern. 467. Newstead v. Searle, 1 Atk. 265. See c. 4. f. 12. note (a). And though a conveyance be covinous in its creation, it may acquire validity by fubfequent matter; as where the land conveyed be afterwards aliened or fettled for valuable confideration, Prodgers v. Langham, 1 Sid. 133, 134. Newport's case, Skin. 423. Smartle v. Williams, 3 Lev. 387. It has also been held, that a purchaser, to avail himself of this act, must be a purchaser for money or other valuable confideration, Twine's case, 3 Co. 83. a. Upton v. Baffett, Cro. Eliz. 444. See also 2 Com. Dig. (4 1. 2.) p. 230. I Eq. Ab. 353. margine.

(g) Gooch's case determines, that a purchaser shall avoid a fraudulent conveyance, notwithstanding his notice of the fraud; but it by no means bears out the author's apparent inference, that all voluntary conveyances are fraudulent, and therefore absolutely void, though the purchaser have notice of them. The terms of the second section of the 27 Eliz. c. 4. seem to be sufficiently

an act of parliament makes void, for they are always fraudulent against purchasers

fufficiently distinct to confine its operation to such conveyances as are made with an intent to defraud and deceive subsequent purchasers; but it were difficult to maintain that a conveyance was made with an intent to defraud a person who, before he became a purchafer, had full notice of fuch conveyance. See White v. Stringer, 2 Lev. 105. And if the terms of the act do not compel a conftruction in favour of a purchaser, with notice of a voluntary conveyance, the policy and spirit of the act appear to me to reject such construction. The policy of the act was to prevent fraud; the construction most favourable to such purpose is that which excludes all temptation to the practice of it. A voluntary deed is binding on the party, and all claiming under him as subsequent volunteers; (see 22 Vin. Ab. 16. & feq.) and to allow him to defeat his bounty in favour of a purchaser for valuable consideration, without notice, is merely to prefer a higher confideration; but to allow a purchaser, with notice, to supersede the claims of a volunteer, feems to encourage a breach of that respect which is morally due to the fair claims and interests of others: It may render the provision of a flatute, intended by the legislature to be preventive of fraud, the most effectual instrument of accomplishing it. I shall not pursue the point further; it seems, however, deferving confideration; for if the construction of this act, which has certainly prevailed in favour of purchasers, with notice, were traced, it would probably appear to have originated in the opinion that the act avoided all voluntary conveyances whatever, though, as very strongly observed by Lord Mansfield,

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(8) Gooch's cafe, 5Co. 60. b. Tonkins v.

Ennis, 1 Eq. Ca. Ab. 334.

Leach v. Dean, 1 Ch. Rep. 78.

Evelyn v. Tem-

pler, 2 Bro.

Rep. 148.

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fers (6); and therefore any person coming in by a voluntary conveyance, and pursuing a purchaser at law, shall be obliged to discover his title in a court of equity, for else he might be put to encounter evidence he never heard of. But he that would have benefit of this act ought to be a purchaser bonâ side, and in vulgar intendment, viz. for a valuable confideration, as a leffee at a rackrent, though he paid no fine, because he is bound to pay his rent during the term, whether the land is worth it or not (7). And this statute is very well penned; for the words of the act are general, and whoever fells it, the purchaser shall avoid fuch fraudulent estate (8), &c. So where a man in a secret manner made an estate to the use of his wife, for her jointure, by fraud and covin, to defeat a purchafer to whom he intended to fell the land; if the fraud be proved in evidence, or confessed in pleading, the purchase shall avoid the estate (b).

(7) Shaw v.

2 Vern. 326.

(8) Burrell's case, 6Co. 72. b.

in Doe v. Routledge, it merely affects fraudulent conveyances.

(b) I have not been able to find the case referred to. It probably, however, involved circumstances of collusion

lusion between the husband and wife, or else was a jointure after marriage; for if it was a jointure before marriage, and such as would, by the 27 H. S. c. 10. bar the dower of the wife, it should seem, whatever might be the secret motive of the husband, the jointure would be entitled to prevail, unless the wife could be affected with privity to the fraud. If the jointure was after marriage, then the case falls within the general rule, that the discharge of a moral obligation shall not be made the pretence of a fraud on legal rights, and whether the wife was privy or not, would be immaterial. See Colville v. Parker, Cro. Jac. 158. for in such case, "it is the motive of the giver, not of the acceptor, which is to weigh," per Lord Northington, Partridge v. Gopp. Amb. 596.

SECTION XIV.

AND though upon the statute of fraudulent devises (i), it has been objected, that the statute being introductive of

(i) Before the statute against fraudulent devises, 3 W. & M. c. 14. bond and other specialty creditors, whose debts did not immediately affect the lands of their debtors, were liable to be defrauded, either by their debtor devising his lands, or by the alienation of the heir before any action could be brought against him: to obviate

of a new law, the relief upon it ought to be at law (1), yet equity will also give re-

(1) Bateman v. Bateman, Pre. Ch. 198.

obviate these frauds, the statute declares, all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple, or having power to dispose by will, fraudulent and void, as against creditors by bond or other specialties; and that fuch creditors may maintain their actions jointly against the heir and the devisce; and that if the heir alien before action brought, he shall be liable to the value of the land; and that the devisee shall be chargeable in the fame manner as the heir would have been, if the lands had descended. By these provisions the bond-creditor is, in some degree, protected against the fraud of his debtor or of his heir; but the statute having expressly excepted devises for payment of debts, or for raifing children's portions in purfuance of any agreement or contract made before marriage; bond and other specialty creditors, whose demands do in their nature affect the land, are still liable to be prejudiced by the right of their debtor to devise his real estate; for if he devise, subject to the payment of debts, his simple-contract creditors will be entitled to be paid, pari passu, with such bond or other specialty creditors; for in confcience their debts are to be equally favoured, being equally due. Woolstoncroft v. Long, 1 Ch. Ca. 32. 3 Ch. Rep. 7. Hixhon v. Witham, 1 Ch. Ca. 248. Anon. 2 Ch. Ca. 54. Girling v. Lee, I Vern. 63. Child v. Stephens, I Vern. 101, Sawley v. Gower, 2Vern. 61. Wilson v. Fielding, 2Vern. 763. And even creditors, whose demands are barred by the statute of limitations, shall be let in, Gofton v. Mill, 2 Vern. 141. And though it has been

(2) White v. Huffey, Pre. Ch. 14. Hungerford v. Earle, 2 Vern. 261.

lief (2); as where the heir having aliened the estate, a bond creditor brings a bill against him and the purchaser (k). But although, by that statute, a man is prevented from defeating his creditors by

been held in some cases, that if the estate be devised to the executor for payment of debts, such circumstance will render the estate legal assets; yet it seems to be now settled that "the circumstance of giving the real estate by any means to the executor shall not occasion the produce of it, when sold, to be applied as it would in the ecclesiastical court; but it must nevertheless be considered as equitable assets." Per Lord Thurlow C. Newton v. Bennet, I Bro. Rep. 135. See also Silk v. Prime, I Bro. Rep. Additions, p. 7. But if the estate descends to the heir, charged with the payment of debts, it will still be legal assets, Freemoult v. Dedire, I P.Wms. 430. Plunkett v. Penson, 2 Atk. 290. Batson v. Lindegram, 2 Brown's Rep. 94. contra.

(k) The case referred to is Bateman v. Bateman; in which the Lord Keeper is reported to have held, that the plaintiff ought to have proceeded at law, Pre. Ch. 198. but, in I Eq. Ca. Ab. 149. pl. 6. the Lord Chancellor is stated to have relieved the plaintiff. But, Q. if the decree was against the purchaser from the heir, he being protected by the statute. Matthews v. Jones, Anstr. Rep. 506. That equity has a concurrent jurisdiction with courts of law, upon the several statutes against fraud, see White v. Hussey, Pre. Ch. 14. and the cases referred to, B. 1. c. 1. s. 3. p. 12.

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his will, yet any fettlement or disposition he shall make in his life-time, of his lands, whether voluntary or not, will be good against bond-creditors (1); for that was not provided against by the statute, which only took care to fecure fuch creditors against any imposition which might be supposed in a man's last sickness; but if he gave away his estate in his lifetime, this prevented the defcent of fo much to the heir, and confequently took away their remedy against him, who was only liable in respect of the lands descended; and as a bond is no lien whatfoever on lands in the hands of the obligor. much less can it be so when they are given away to a stranger (3).

(1) Mr. Vernon, Pre. Ch. 521., in referring to the case of Parsloe v. Weedon, observed, that till that resolution he should have been of another opinion, such a disposition having been held fraudulent by Lord Chief Justice Holt, in the case of Templeman v. Beke. See Jones v. Marsh, Forrest. 64. where Parsloe v. Weedon is observed upon.

(3) Parflow v. Weedon, 1 Eq. Ca. Ab. 149. pl. 7. 13Vin. Ab. 522.

SECTION XV.

SO if a freeman of London (m) makes a gift of any part of his personal estate in his life-time, or if he turns all his estate into a purchase of land, he may dispose of

(m) In Kemps v. Kelfey, Pre. Ch. 594. Lord Macclesfield, C. flated "the cuftom of London to be the remains of the old common law, that a man could not give away any part of his estate without the confent of his children, and is fo taken notice of by Bracton; but it being found extremely inconvenient and hard, it was by the tacit confent of the whole nation grown into difuse, for no law has been ever made to repeal it. But in the city of London, where the mayor and aldermen had the care of orphans, they by that fole authority and power have preserved this part of the common law in London." By this law, if a freeman of London dies, leaving a widow and children, his perfonal effate, after his debts are paid, and the customary allowance for his funeral and the widow's chamber being first deducted, is to be divided into three equal parts, and thus disposed of: one third part to the widow, another third part to the children unadvanced by him in his life time, and the other third part fuch freeman may bequeath by will. But if a freeman of London has no wife, but has children, the half of his personal estate belongs to his children, and of the other half he may dispose by will or otherwise, Laws of London, 69. Fitz. N. B. 122. 2 Inft. 33. Northey v. Strange,

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of this as he thinks fit (1). So if money be given by a freeman, to be laid out in land, and fettled (2), &c. or if a freeman, upon a fecond marriage, conveys leases in trust, &c. and in the settlement there is an agreement that the trustees should sell these leases, and invest the money in the purchase of lands of inheritance to be settled to uses: by the agreement, these leases are now to be considered, in equity, as if a purchase had been actually made (n), and the freeman had paid the money out of his pocket (3).

I P. Wms. 340. Hedges v. Hedges, I Bro. P. C. 254. The custom, however, extends only to personal estates, probably from the citizens of London, in the origin of this custom, not regarding real estate, supposing freemen would not purchase such estate, but rather employ their fortunes in trade, for the benefit of commerce, I Eq. Ca. Ab. 150. Marg. See also 2 Vez. 593. But though estates of inheritance, or freehold in houses, lands, &c. or terms to attend the inheritance, are not within the custom, Rich v. Rich, 2 Ch. Ca. 160. Dowse v. Dorival, I Vern. 104. Tissin v. Tissin, 2 Freem. 66. yet a mortgage in see is within the custom, Thornborough v. Baker, I Ch. Ca. 285.

(n) This is agreeable to the principle of equity which confiders things agreed to be done as actually done. See c. 6. f. 9.

(1) Turner v. Jennings, 2 Vein. 612. 685. Hall v. Hall, 2 Vern. 277. Dethick v. Banks. 2 Ch. Rep. 48.
(2) Babington v. Greenwood, : P. Wms. 532. Frederick v. Frederick, r.P. Wms. 719. Annard v. Honeywood, 2 Ch. Ca. 117. 1 Vern. 345. 2 Ch. Rep. 97-

(3) Hancock v. Hancock, 1 Eq. Ca. Ab. 153pl. 8.

SECTION XVI.

BUT the custom of London must be entirely given up, if equity would not assist to set aside conveyances (0) in fraud of the custom (1): and therefore, where a freeman had not altogether dismissed himself of the estate in his life-time, and the deed being made when he was languishing, and but a little before his death, it ought to be looked upon as a donatio causa mortis (p), but will stand good as to a moiety, which he, having no wife, might dispose

- (0) Equity will not only fet afide conveyances, in fraud of the custom, but will decree the personal estate to be divided according to the custom, if the owner, for valuable consideration, appear to have agreed to take up his freedom. Frederick v. Frederick, 1 P. Wms. 710.
- (p) "Donatio causa mortis is, when a person, in his last sickness, apprehending his dissolution near, delivers, or causes to be delivered to another, the possession of any personal goods, (under which have been included bonds and bills drawn by the deceased upon his banker,) to keep in case of his decease. This gift, if the donor dies, need not the assent of his executor; yet it shall not prevail against creditors, and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself,

(1) Topp v.
Topp, Toth. 51.
Tomkyns v.
Ládbroke,
a Vez. 591.

dispose of (2). So if a man has it in his power, as by keeping the deed, &c. or if he retains the possession of the goods, or any part thereof (3); or if there be a deed of trust to the use of his will (4), or to pay any fum as he should appoint, and he makes an appointment by deed and will, this will be deemed fraudulent and void (5). So if a man, possessed of a term for years, voluntarily affigns it as a provision for his child (6); yet his wife shall have her customary share (q). a voluntary judgment shall not prevail against debts by simple contract, nor against

(2) Turner v. Jennings, 2 Vern. 612. (3) Finner v. Longland, 2 Eq. Ca. Ab. 263, 264. pl. 5. 2 Vern. 612, 685. Hall v. Hall, 2 Vern. 277, (4) Nott v. Smithies, 1 Ch. Rep. 45. (5) Turner v. Jennings, 2 Vern. 685. (6) City v. City, 2 Lev. 130, but see Cierke v. Leatherland, 2 Vern. 98.

himself, being only given in contemplation of death, or mortis caufà." 2 Bla. Com. 514. Blount v. Burrow, 4 Bro. Rep. 72. Hill v. Chapman, 2 Bro. Rep. 612. Tate v. Hilbert, Ch. Rep. 287. And as fuch donation may be avoided by creditors, fo may it by the wife or children of a freeman, if it break in on their customary shares. Turner v. Jennings, 2 Vern. 612.

(9) But though the husband cannot deprive the wife of her customary part, yet she may be bound by an express agreement, before marriage, to accept a jointure in lieu of it, Bravell v. Pocock, 2 Freem. 67. Atkins v. Waterson, 1 Eq. Ca. Ab. 157, 158. And in fuch case the husband's estate shall be distributed as if there were no wife, Pusey v. Desbouverie, 3 P. Wms.

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(7) Fairbeard v. Bowers, 2 Vern. 202. Pre. Ch. 17.

(8) Hammond v. Jones, 1 Lev. 227.

(9) Pate v. Hatton, 1 Ch. Ca. 199. Biddle v. Biddle, cited in a note, 1 P. Wms. 118. against the widow of a freeman (7); but his debts being paid, the judgment will bind the legatory part (r). And although the father cannot dispose of the customary part from his children, yet he may by his will (s) appoint, that if one dies before twenty-one, another shall have his part (8). Yet he cannot devise his child's part over to another, in case that child die in minority (9). But see now the late statute 11 Geo. 1. cap. 18. which has made a great alteration in these matters (t).

- 321. Lewin v. Lewin, 3 P. Wms. 15. Metcalfe v. Ives, 1 Atk. 63. Morris v. Burroughs, 1 Atk. 399.
- (r) And would be preferred to legacies, Cray v. Rooke, Forrest. 156. Jones v. Powell, 1 Eq. Ca. Ab. 84. pl. 2.
- (s) It was formerly much doubted whether a free-man's will could in any way operate on the orphanage part; it feems now, however, to be fettled that a freeman cannot devife either the orphanage part, or the contingency of the benefit of furvivorship among orphans; but such freeman may give by will, to his children, legacies inconfistent with the distribution under the custom, and then the children must elect whether they will abide by the will or by the custom. Hervey v. Desbouverie, Forrest. 130.
- (1) The 11 G. 1. c. 18. f. 17. enacts, That it shall and may be lawful to and for all and every person and persons

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persons who shall, at any time, from and after the 1st day of June 1725, be made or become free of London, and also to and for all and every person and persons, who are already free of the said city, and on the faid 1st day of June 1725 shall be married, and not have iffue by any former marriage, to give, devife, will, and dispose of his and their personal estate and estates, to such person or persons, and to such use and uses as he or they shall think fit: provided nevertheless, that in case any person who shall at any time or times, from and after the faid 1st day of June 1725, become free of the faid city; and any perfon or perfons who are already free of the faid city, and on the 1st day of June 1725 shall be married, and not have issue by any former marriage, hath agreed, or shall agree by any writing under his hand, upon or in confideration of his marriage or otherwise, that his personal estate shall be subject to, or to be distibuted or distributable according to the custom of the city of London; or in case any person so free, or becoming free as aforefaid, shall die intestate, in every such case the perfonal estate of such person so making such agreement, or fo dying intestate, shall be subject to, and be diftributed and distributable according to the custom of the faid city, any thing therein contained to the contrary, in anywife notwithstanding.

SECTION XVII.

Heineceius, Elem. J.N.&G. c. 14. f. 400.

(1) Puff. B. 3. c. 7. f. 10. Dig. lib. 44. ti. 7. l. 11.

(2) Brian v. Acton, 5 Vin. Ab. 533. pl. 33.

(3) Musgrave v. Dashwood, 2 Vern. 63. (4) See Thirveton v. Collyer. 1 Ch. Ca. 48. 3 Ch. Rep. 8. Delabeere v. Bedingfield, 2 Vern. 103. (5) Bruges v, Curwen, 2 Vern. 575.

TATE are likewise unable to oblige ourfelves to any performance about the goods or actions of other men, not fubject to our disposal; and therefore no man's contract can be carried into execution in equity, any further than his interest or lawful power extends (1); for equity will not decree a man to commit a wrong to a third person; as to compel a tenant for life to make a diffeifin or forfeiture of his estate (2); or bind one who claims paramount, as to decree an agreement of one jointenant (u) against the furvivor (3); or compel a freeholder of a manor to confent to an inclosure (4) or stint of a common (5), unless the bill charge that he would be benefited by it (x). But because it would be inconvenient

(u) Unless the agreement amount to a severance of the jointenancy in equity; in which case equity would decree against the survivor. Hinton v. Hinton, 2 Vez. 634.

(x) In Delabeere v. Bedingfield, 2 Vern. 103. the Lords Commissioners observed, that there was "a great difference between an agreement for an inclosure,

nient that an engagement, seriously entered into, should be of no effect, the law ordains, that he who undertakes for another, or makes a contract in his name, should procure a performance from him (y),

or

and an agreement only for a stint of common. It is a proper and natural equity to have a stint decreed; and though one or two humoursome tenants stand out, and will not agree, yet the court will decree it, (see Bruges v. Curwen, 2 Vern. 575. con.) but it is otherwise as to an inclosure." If, however, lands have been inclosed for a length of time, with consent of most of the parishioners, and sufficient common be left for the tenants, equity will restrain any proceedings to throw open the inclosure, Weekes v. Slake, 2 Vern. 301. Arthington v. Fawkes, 2 Vern. 356. Piggott v. Kniveton, Toth. 109. See Statute of Merton, 2 Inst. 84.

(y) Upon this principle courts of equity have, in fome cases, decreed the husband to procure the wife to join in a conveyance of her real estate, he having covenanted to such essect, Hale v. Hardy, 3 P. Wms. 189. Barrington v. Horn, 2 Eq. Ca. Ab. 17. pl. 7. But it is observable, that though the agreement of the husband, that his wife shall do any particular act, affords a reasonable presumption that he has previously gained her consent; yet, "if after all, it can be made appear to have been impossible for the husband to procure the concurrence of his wise, (as suppose there are differences between them,) surely the court is not to decree an impossibility, especially where the husband offers to return all the money,

(6) Puff. B. 3. c. 7. 10 Inst. lib. 3. ti. 20. f. 3. 1 Domat, B. 1. ti. 1. f. 2. 6. See Lilly v. Hedges, 1 Str. 553.

(7) Cass v. Rudele, 2 Vern.

or stand in his stead (6); as if A. articles on the behalf of B. to purchase four houses in Jamaica, and, pending the suit, to compel the feller to make a good title, the houses are swallowed up by an earthquake (7); yet A. shall pay the money, although he has not fufficient effects of B.'s in his hands (z).

money, with interest and costs." See the reporter's note to Hale v. Hardy. A further objection to fuch a decree may be drawn from its tendency to encourage that coercion and undue influence which the policy of our law fo anxiously endeavours to restrain in all concerns respecting the real property of the wife. Nor does the case of the covenantee apparently entitle him to fo much respect; for he must be considered as being fully apprized of the difficulties, and to have rested his pretensions on the event of their being removed. These considerations induced Lord Cowper, C. in Outread v. Round, 4 Vin. Ab. 203. pl. 4. to refuse to decree a specific performance of fuch a covenant, the husband offering to refund the purchase-money, with costs.

(z) In Pope v. Roots, 7 Bro. P. C. 184. Lord C. Appley observed, that the case (Cass v. Rudele) was mifrepresented; for that by the printed cases it appeared that Cass made a title in January 1691, by conveyance executed, and the earthquake did not happen till 1692. That Rudele, by his answer, admitted he had 700l. in his hands, and the decree was founded on a good title, having been conveyed to him. See note to Mortimer v. Capper, I Bro. Rep. 157.

SECTION XVIII.

△ ND if a third person treats for one that is absent, without his order, but undertakes for his confent, the abfent party does not enter into the covenant till he ratifies it; and if he does not ratify it, the person who undertook for his con- (1) 1 Domat, B. 1. ti. 1. fent, only, shall be bound (1); as if A. and B. infolvents, apply to a scrivener, who had procured 200l. for A. upon their bond to C. and D. to compromife the debt, and the scrivener tells them, that C. and D. would fland to any thing that he did, and accordingly compounds it with them; yet A. and B. shall pay C. and D. their whole money, they not being any way privy to the agreement, and the scrivener shall repay them, and indemnify them according to the agreement, though he acted only as an agent (2). So if A. by writing agrees with B. and C. to pave the streets in a parish, and they, in behalf of the parish, agree to pay him for it, and this writing is lodged in the hands of B.; if A. paves the streets, he must have relief against the undertakers.

f. 2, 6. but fee Pothier Traite des Obligations, par. 2, c. 6. f. 8. arti. 2,

(2) Parrott v. Wells, 2 Vern. 127. but fee Martin v. Kingfby, Pre. Ch. 200.

(3) Meriel v. Wymondfel, Hard. 205. See City of London v. Richmond & al'. 2 Vern. 421. takers, and the undertakers must take their remedy over against the parish (a); and more especially in this case, the written agreement, which is his evidence, being in the hands of one of them (3). On the other side, where a man acts in execution of the authority given him by another, either expressly or impliedly; then it is by relation the act of that other, and he acquires no right, nor brings any obligation upon himsels (b). Yet if a verdict is obtained

- (a) The general rule requires all persons interested in, or to be affected by, any demand, to be parties to the fuit; but though this rule is applied to many cases, from the number of persons interested, great inconvenience must necessarily arise; (Leigh v. Thomas, 3 Vez. 312. Parfons v. Neville, 9 November 1791;) yet as it would be impracticable to make a whole parish parties to a suit, at least with any prospect of coming at justice, the general rule is, in such case, made to give way to the principle of convenience. where it appears that the credit was given to particular persons, and not to the general fund or undertaking, equity will dispense with the general rule. See Nixon v. Nixon, 30 Oct. 1739. Cullen v. Duke of Queensberry and others, I Bro. Rep. 101. and the cases there cited. See also Mr. Mitford's Treatife, 144, 145. Pre. Ch. 592.
- (b) In Johnson v. Ogilby 3 P. Wms. 279. Lord Ch. Talbot stated the "difference to be, where the party,

obtained against an agent or trustee, equity will not relieve against such verdict (c), but will decree that he shall be reimbursed by his principal, and stand in the place of the creditor (4).

(4) Langdon v. Airican Comp. Pre. Ch. 221-

party, undertaking for or on behalf of his client, has an authority fo to do, and where he has not. If such undertaker has no authority, then it is a fraud, and the undertaker ought himself to be liable; but where there is such an authority given, it is only acting for another, like the case of a factor or broker acting for their principals, who were never held to be liable in their own capacities;" but where one undertakes or acts for another under an authority, he must, in order to protect himself from being personally bound by such undertaking, strictly pursue his authority. See Goodwin v. Gibbons, 4 Burr. 2108. Stone v. Cartwright, 6 Term Rep. 411.

(c) In Graham v. Stamper, Pre. Ch. 45. 2 Vern. 146.

1 Eq. Ca. Ab. 308. the plaintiff was relieved in equity against so much of the judgment as respected the goods which he had purchased for the king's use.

SECTION XIX.

THE statute de donis conditionalibus, made 13 Ed. 1. (d), in a manner created perpetuities (1); for by that statute the tenants in tail could do no act in prejudice of the issue, but the will of

(1) 2 Inft. 331. Mildmay's cafe, 6 Rep. 40. Moor, 155.

> (d) Littleton observes, that "before this statute all inheritances were fee-fimple; for all the gifts which are specified in that statute, were fee-simple conditional, at the common law; fec. 13. to the property capable of being entailed, tenement is the only word used by the statute; but this, according to Lord Coke, (1 Inft. 19. b.) includes not only all corporate inheritances which are or may be holden, but also all inheritances issuing out of any of those inheritances, or concerning, or annexed to, or exercifable within the fame, though they lie not in tenure, as rents, estovers, commons, or other profits whatfoever, granted out of land or uses, offices, dignities which concern lands; and fome particular places may be entailed, because all these favour of the realty; but merely personal chattels, which savour not of the realty, cannot be entailed, Neville's case, 7 Rep. 33.; neither can an office which merely relates to fuch perfonal chattels, nor an annuity which charges only the person, and not the lands of the grantor: but in these last, if granted to a man and the heirs of his body, the grantee hath still a fee conditional at common law, as before the statute, and by his alienation may bar the heir or reversioner. An estate to a man and his heirs, for another's life, cannot be entailed; for this is strictly no estate of inheritance,

the donor was to be observed (e), and the same law continued about 200 years. But in 12 Ed. 4. it was resolved by the judges, that by a common recovery the estate tail should be barred, for the mischiess that were introduced into the commonwealth thereby (f). And by 4 H. 7. cap.

inheritance, and therefore not within the stat. de donis, Baker v. Bailey, 2 Vern. 225. but see Finch v. Tucker, 2 Vern. 184. Neither can a copyhold estate be entailed by virtue of the statute; for that would tend to encroach upon and restrain the will of the lord; but by special custom, a copyhold may be limited to the heirs of the body, Heydon's case, 3 Rep. 8. b.; for here the custom afcertains and interprets the lord's will; fee 2 Bla. Com. 113. But though estates pur auter vie, and personal chattels, are not entailable, they may however be so fettled as to answer the purposes of an entail, and be rendered unalienable, almost for as long a time as if they were entailable in the ffriet fense of the word. See Low v. Barron, 3 P. Wms. 262. and Mr. Hargrave's note (5), Co. Litt. 20. a. b. where the cases upon this subject are brought together and distinguished. See also Norton v. Frecker, I Atk. 523.

- (e) Voluntas donatoris in charta fua manifeste expressa observetur. Co. Litt. 21. a.
- (f) The decision in Taltarum's case, that a common recovery should bar and destroy the entail, having greatly abridged estates tail with regard to their duration, other means were soon devised to strip

cap. 24. (g) a fine had the fame force given it, as to the iffue in tail, though it did not extend to him in remainder, without he neglected to make claim within five years after it fell into possession (2); and this court will not superfede fines and recoveries; as to make a

(2) Co. Litt. 372. a.

> flrip them of other privileges. By 26 H. 8. c. 13. fuch estates are made subject to forseiture for high-treason. By 32 H. 8. c. 28. leases made by tenant in tail, which do not tend to the prejudice of the iffue, are declared to be good, and to bind the issue. By 32 H. 8. c. 36. a fine by tenant in tail is by the construction of the 4 H. 7. c. 24. declared to be a bar to the iffue, and all claiming under them. By 21 Jac. 1. c. 29. estates tail are made liable to be fold by the assignees of a bankrupt, tenant in tail; and by the construction of 43 Eliz. c. 4. the appointment of tenant in tail, to a charitable use, is declared to be good, without either fine or recovery. But in these cases the right of the crown, having the reversion, is (subject to particular exceptions) faved by 34 & 35 H. 8. c. 20. See Co. Litt. 372. Cruise on Recoveries, 256. By these provisions of the legislature, estates tail are now more free and capable of alienation, than were conditional fees at common law, which could not be made absolute till the condition was performed, and then only for particular purposes. See Co. Litt. 19. a. 2 Bla. Com. 110, 111. Mr. Butler's note (1). Co. Litt. 326. b.

(g) See 32 H. 8. c. 36.

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bargain and sale of tenant in tail of a legal estate good against the heir; for he is, since the statute, to be considered as a purchaser, and is in immediately from the donor per formam doni (3). So that, as it seems, no act of tenant in tail shall be carried into execution in a court of equity against the issue any further than at law; for this would be to repeal the statute de donis (h): but if the issue enters, and accepts of the agreement, it becomes his own, and shall bind him (4); and any agreement, with an equivalent, will bind the issue as a partition (i), though but by

(3) Sayle v. Freeland, 2 Ventr. 350. Cavendift v. Worsley, Hob. 203. Powell v. Powell. Pre. Ch. Ca. 278.

(4) Rofs v. Rofs, 1 Ch. Ca.

- (b) This is to be understood of a tenant in tail of a legal estate, whose estate not being more favoured in equity than at law, cannot bind his issue by a covenant to convey, though for valuable consideration, Ross v. Ross, I Ch. Ca. 171. Coventry v. Coventry, 10 Mod. 469.; nor by a covenant for further assurance, Jenkins v. Keymes, I Lev. 237.; nor by articles to convey for payment of debts, Herbert v. Fream, 2 Eq. Ca. Ab. 28. pl. 34.; nor by a covenant to levy a fine, though there be a decree for such purpose, Weale v. Lower, I Eq. Ab. 266. cited in Fox v. Crane, 2 Vern. 306. But see Hill v. Carr, I Ch. Ca. 294.
- (i) Or an exchange of lands; in either of which cases the law will imply a warranty, which descending

(5) Thomas v. Gyles, 2 Vern. 232.
(6) Sherborne v. Clerk, t Vern. 273.
Bunce v. Philips, 2 Vern. 50.

parol (5): nor will the court aid the iffue in tail (j) against a discontinuance (k), though by a voluntary conveyance (6); so far does it favour the owner of the inheritance who has power to dispose of it.

on the iffue, will bind them in respect of the equivalent, Co. Litt. 174. a. 384. a. 2 Bla. Com. 300.

- (j) This rule applies to those in remainder as well as to the iffue. Stapleton v. Sherrard, 1 Vern. 212. Kelly v. Berry, 2 Vern. 35.
- (k) "A discontinuance of estates in lands, &c. is, in legal understanding, an alienation made or suffered by tenant in tail, or by any that is seised in auter droit, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action, and cannot enter." Co. Litt. 325. a. but a conveyance by lease and release by tenant in tail, does not work a discontinuance, but merely passes a base see, voidable by the entry of the issue in tail. Litt. s. 598, 600.

SECTION XX.

AS for a trust or equitable interest, it is a creature of their own, and to be governed by their rules; for an entail of a trust

trust is not within the statute de donis (1), and therefore may be aliened without a recovery by any manner of conveyance (1); yet some have thought the method

(1) North v. Champermon, 2 Ch. Ca. 63. 78. Carpenter v. Carpenter, 1 Vern. 440. Beverly v. Beverly, 2 Vern. 131. Sayle v, Freeland, 2 Ventr. 350.

(1) This consequence seems to be too extensively drawn; for though it be now fettled that the operation of fines, and recoveries by the cestuy que trust, is the fame upon trust estates as upon legal estates, yet it is by no means admitted that any mode of conveyance by tenant in tail, of a trust estate, will bar the issue, and those in remainder. In North v. Champernon, 2 Ch. Ca. 64. Lord Chancellor Finch appears to have faid, that tenant in tail of a trust may bar his iffue by a feoffment, or bargain and fale; and in Beverley v. Beverley, 2 Vern. 131. Carpenter v. Carpenter, 1 Vern. 440. and in Baker v. Bailey, 2 Vern. 225. the fame opinion feems to have prevailed.—That cestuy que trust, if the trustees join, may bar the entail by a feoffment, was determined in Bowater v. Elly, 2 Vern. 344. But in Legatt v. Sewell, I P. Wms. 91. 2 Vern. 552. Lord Cowper intimated his doubt, "whether only a deed executed by cestuy que trust in tail, should bar the remainder-man, or even the iffue, in regard a deed may be made at a tavern, or by furprize; but a recovery is a folemn and a deliberate act." And the prevailing practice now is to fuffer a recovery, which, however, may be done without the concurrence of the trustees, Burnaby v. Griffin, 3 Vez. 276. Kirkman v. Smith, 1 Vez. 260. Lord Hardwicke's opinion as to the effect of leafe and releafe, upon an equitable estatetail. That bargain and sale will not, see Legatt v. Sewell,

thod of ommon recoveries a very prudent and political inflitution, and fit to be followed in equity (m); that men may have some restraint from overturning the settlements of their family.

v. Sewel, 2 Vern. 552.; but that an equitable effate in copyhold may be barred by furrender, see Radford v. Wilson, 3 Atk. 815. His Lordship, however, in Otway v. Hudson, 2 Vern. 583. seems to have thought that a devise by will was sufficient to bar the entail of a trust; which point had been before so decided by Lord Keeper Wright, in Woolnough v. Woolnough, Pre. Ch. 228.

(m) The reason for dispensing with the strict rules of law, in cases of recoveries of trust estates by the cestuy que trust, is stated by Lord Nottingham, in North v. Champernon, 2 Ch. Ca. 63. 78. I Vern. 13. It does not, however, establish the necessity of the tenant in tail of a trust being allowed to bar the entail by every other mode of alienation.

SECTION XXI.

SO the head of a corporation aggregate, as a dean, &c. alone, cannot make a lease or discontinuance; for it ought to be

be by the entire corporation, or else it is void, except of the possessions which they have fevered from the rest of the corporation: but an abbot or bishop may difcontinue (n), for they are fole seized in fee (1). &c. Otherwise of a parson, for he is not seized in see to every intent (2); and a deed of an abbot, ex affenfu capituli, is good, because they are dead perfons in law. Otherwise of a dean, ex affensu capituli; for his chapter is parcel of the corporation, and feized with the dean, and shall plead and be impleaded with him (3). So of a mayor and commonalty. But in all uncertain bodies. as mayor and commonalty, &c. if the greater part do an act (o), this shall bind, although

(1) Co. Litt. 325. b. (2) Co. Litt. 300. b. 67. a. Litt. f. 644. 646.

(3) Co. Litt. 325. b.

(n) By the discontinuance of the abbot or bishop, the successor was driven to his writ de ingressu sine assensive assensive as the successor was driven to his writ de ingressu sine assensive as the successor was driven to his writ de ingressu sine assensive as the successor was driven as the successor was dri

(o) And the agreement of the major part of a cor-Vol. I. X poration (4) Dr. Hafcard v. Dr. Somany, 1 Freem. 504: (5) Moor, 578. 33 H. 8. c. 27. although the rest will not agree (4), and the assent may be tried by voices or hands; quia ubi major pars ibi tota (5); else they might never all agree.

poration being entered in the corporation books, though not under the corporate feal, will be decreed in equity, Maxwel v. Dulwich Coll. 14 July 1783. The contrary, however, appears to have been held in Taylor v. Dulwich College, 1 P. Wms. 655. But though a corporation cannot do an act in pais without their common feal, yet they may do an act upon record. The Mayor of Thetford's case, 1 Salk. 192.

SECTION XXII.

AND a corporation is in divers respects as one body, or as several persons, and may charge and be charged accordingly. The deed, therefore, of a corporation shall not bind them in their private capacity (p), if it be made in the name of

(p) In a note to Harvey v. East India Company, 2 Vern. 396. the members of the Hamburg Company are stated to have been charged in their private perfons,

of their corporation (1); neither can they be charged in their private capacity with debts of the corporation, although they are disfolved (2). So they shall be intended seized in that capacity by which name they are named; and when the mayor or other head of the corporation is in prison, touching his office for a bond made by him and the commonalty; this is an imprisonment to him as mayor (q). So if a corporation be changed (r), yet they shall not be discharged of covenants, annuities, and the like, with which they

(1) City of London, concerning the duty of water bailage, 1 Ventr. 357.

(2) Edmunds v. Brown, 1 Lev. 237.

fons, the Company having no goods; but quere, Whether the Company was a corporation? if it was, the law of the decision seems very doubtful. In the case of the King v. the Corporation of Rippon, Com. Rep. 86. it is faid, that an action lies against the members of a corporation by their private names, for a false return to a mandamus, directed to the corporation by their corporate names. See also the Mayor of Thetford's case, I Salk. 192.

- (q) And the opinion of Brian C. J. was, that the mayor and commonalty should have action for the imprisonment of their mayor, 6 Vin. Ab. 304. cites 21 Ed. 4. 14 & 15.
- (r) For a corporation may refuse the new charter; and if it does, such charter is void. The King v. Larwood, Comb. 316. 1 Ld. Raym. 31.

(3) Bp. of Rochester's case, Owen, 73. 2 And. 107. 6 Vin. Ab. 285. pl. 6 8. (4) Luttrel's case, 4Rep. 87.b. the Mayor of Scar borough v. Butler, 3 Lev. 237. Haddock's case, 1 Ventr. 355.

were before bound (3); and by the fame reason they shall retain the lands and possessions which they had before; and so debts due to them remain (4). But if the corporation be dissolved, the donor shall have his lands again (s).

(s) This is agreeable to the opinion of Lord Coke, I Inst. 13. b. But Mr. Hargrave, in his note upon this point, refers to the cases of Johnson v. Morris, Hal, MSS. and Southwell v. Wade, I Roll's Ab. 816. and Poph. 91. as authorities against the donor, and deciding that the land shall escheat. It is observable, however, that from the report of Johnson v. Norway, Winch. 37. which he conceives to be the same case as that cited by Lord Hale, the judges do not appear to have finally determined the point; and the judgment of the court in Southwell v. Wade, according to Rolle, proceeded on the circumstance of the thing having been granted over by the corporation; and therefore, " ne escheatera al grantor coment que ceo duissoit aver eschete sil navoient ceo grant ouster." The diffinction, however, admits the reversionary right of the grantor, if the thing had not been granted over; and the confusion arises from the term escheat being used as fynonimous with "revert," which Rolle appears to have done in many inflances, but particularly in the following paffage, from the above page: "Si home grant un rent al auter et ses heires, et il mourut fans heire ceo eschetera al grantor, et sera extinct en le terre." Another circumstance occurs in the case of Southwell v. Wade, which feems to render the decifion favourable to Lord Coke's opinion; namely, that the faggots which were the fubject of the grant,

were

were claimed by the mayor, &c. by grant from the crown, whose right was derived, not by sorce of an escheat, but by grant from the masters, &c. of the hospital, who were the immediate grantees of the prior, &c. Whence it appears that the right of the crown was not rested on an escheat, but on an express grant, which it scarcely would have been, if the claim could have been supported by the doctrine of escheat, Poph. 91. See also Godb. 211, Moore, 283. which are authorities in savour of Lord Coke's opinion, which is also adopted by Sir William Blackstone, 2 Com. 256.

SECTION XXIII.

IT is also against a maxim in law, that a feme covert should be bound without a fine (1); so that a fine is necessary for the disposing of her lands in fee, or of freehold (t). The common law, therefore, gave

(1) 1 Roll's Ab. 376. pl. 8.

(t) A married woman is as completely bound by a recovery suffered by her and her husband, as she is by a fine, Lord Cromwell's case, 2 Rep. 74. 78. Mary Portington's case, 10 Rep. 43. Cruise on Recoveries, 143. But it has been doubted whether a husband, seized jure uxoris, could make a tenant to the præcipe of his wise's lands, for the purpose of a

recovery,

(2) Litt. f. 594. Co. Litt. 326. a. F. N. B. 428.

gave her a cui in vita after her husband's death, for the recovery of the land aliened by him, and to the heir a fur cui in And in all cases, where the vita (2). wife might have a cui in vita at common law, she may enter by the statute of

recovery, without the wife's joining him in a fine. The doubt probably arose from the language of Lord Talbot, reported in Robinson v. Cummins, Forrest. 167. But as the report of that part of the case appears, from an opinion given by Mr. Booth, and also from a MS. note of the same case, in the possession of Mr. Butler, to be erroneous, it may now be confidered as the better opinion, that the husband can make a good tenant to the præcipe, for the purpose of a recovery. See Cruise on Recoveries, p. 52. and Butler's note in Co Litt. 326. b. It feems also to be admitted, that a feme covert may referve to herfelf, before marriage, the power of disposing of her real estate. without fine, either by conveying in trust, or by power over an use; but Lord Hardwicke doubted, whether articles of agreement between husband and wife, that the wife might dispose of her estate, would bind the heir, Peacock v. Monk, 2 Vez. 191. This doubt, however, was done away by the House of Lords, in Wright v. Cadogan, 6 Bro. P. C. 156. See Doe v. Staple, 2 Term Rep. 695. So that a feme covert may now dispose of her inheritance, either by fine, recovery, declaration of trust, power over an use, or articles; provided the trust or power be created, or the articles executed before marriage. See also Compton v. Collinson, 1 Bla. T. Rep. 334. see page 112. 113.

32 H.

32 H. 8. cap. 28. (u). And where the issue cannot have a sur cui in vita or formedon, there he shall not enter within the remedy of this statute; as during the life of the husband; for the words of the act are, "According to their rights and titles therein," viz. (3) be it in the life of the husband after a divorce a vinculo matrimonii, for then at common law a cui ante divortium lay (4), or after his (4) F.N.B. 454. death (5). And fo in equity, no agreement of the husband to part with the wife's inheritance shall bind the wife, or be carried into execution (6); but if the wife, upon private examination, confents, the court will decree an agreement of the husband to convey his wife's land (x):

(3) Greeneley's cafe, 8 Rep. 72. b. 73.

(5) Co. Litt. 326. a. Broughton v. Conway, Moore, 58. Greeneley's ca'e, 8 Rep. 73. a. (6) Bryan v. Woiley, 9 Feb. 1721. 4 Vin. Ab. 57.

(u) The words of the act extend the right of entry to those in remainder or reversion. They are also confidered to be fufficiently comprehensive to affect recoveries, Co. Litt. 326. a.

(x) I have not been able to find the case referred to, and the law of it feems to me very doubtful; for though courts of equity will receive the confent of the wife, in case of money, to be laid out in land, in which, when laid out, she would be tenant in tail, Oldham v. Hughes, 2 Atk. 453., yet I am not aware of a fingle case or dictum, from which it can be in-

ferred

yet

yet the bill must regularly be brought against them both; for the wife ought not by law to convey by any compulsion from the husband, as it will otherwise be intended that the does. And if a feme covert agrees to fell her inheritance, fo as she may have part of the money, and the land is accordingly fold, and her part of the money put into trustees hands; this money is not liable to the husband's debts, though she afterwards agree that it should be so; nor shall any promise, made by the wife for that purpose, subfequent to the first original agreement, be obliging on that behalf (7).

(7) Rutland v. Molineux, 2 Vern. 64.

ferred that a feme covert can in equity bind or convey her inheritance, unless a trust-estate, by any other means than she can at law; and the rule of law is, that " no feme covert shall be barred by her confession of her inheritance or freehold, but when she is examined by due course of law; and that is the cause, that if the husband and wife acknowledge a statute or recognizance, it is void as to the wife, although she furvives her husband. So if the husband and wife acknowledge a deed to be inrolled, it is void as to the wife; and the reason is, because no such writ is depending against the husband and wife, upon which the wife may be examined." Mary Portington's case, 10 Rep. 42. b.

SECTION XXIV.

NEITHER will equity take away the benefit of survivor from the wife, of such things as the law has cast upon her (y); as money, or the like, in trust, although the husband make her a jointure

(v) The property of the wife, to which she is entitled by furviving her husband, are either chattels real, or choses en action; but "with respect to her chattels real, as leafes for years, there is a distinction between those which are in the nature of a present vested interest in the wife, and those in which she has only a possible or contingent interest. If a man marry a woman possessed of or entitled to the trust of a present actual or vested interest in a term of years, or any other chattel real, it fo far becomes his property, that during her life he may dispose of it, Incledon v. Northcote, 3 Atk. 430. and if he survives her, it vests in him absolutely; but if he does not actually dispose of it in his life-time, and she survives him, it belongs to her, and not to his representatives; for he cannot dispose of it from her by will, Packer v. Wyndham, Pre. Ch. 418. Tudor v. Samyne, 2 Vern. 270. See also Sir Edward Turner's case, IVern. 7. Pitt v. Hunt, IVern. 18. Bates v. Dandy, 2 Atk. 207. If a man marry a woman entitled to a possible or contingent interest in a term of years, if it be a legal interest, that is, fuch an interest as, upon the determination of the particular estate, or the happening of the contingency, will immediately vest in possession in the wife; there the

(1) Lifter v. Lifter, 2Vern. 68. Twifden v. Wife 1Vern. 161. Salwey v. Salwey, Amb. 692. ture (1), unless it be full and adequate to her fortune (2). So chattels real in posfession

the husband may affign it, except, perhaps, in those cases where the possibility or contingency is of such a nature, that it cannot happen during the husband's life-time, Co. Litt. 46. b. Lampett's case, 10 Co. 51. a. Hutt. 17. 1 Salk. 326. But it is an exception to this rule, at least in equity, that if a future or executory interest, in a term or other chattel, is provided for the wife, by or with the confent of the husband, there the husband cannot dispose of it from the wife. as it would be abfurd and unfair, in the highest degree, that he should be allowed to defeat his own agreement. But fuch provision for the wife, if made by the husband, unless before marriage, will not in general be good against creditors or purchasers. Doyley v. Perfull, I Ch. Ca. 225. Turner's cafe, I Vern. 7. Pitt v. Hunt, I Vern. 18. Walker v. Sanders, I Eq. Ca. Ab. 78. With respect to things in action, they do not vest in the husband until he reduces them into possesfion. Brotherow v. Hood, 2 Com. Rep. 725. But the husband may fue alone for a debt due to the wife upon bond, &c. Aleyn's Rep. 36. But if he join her in the action, and recover judgment, and die, the judgment would furvive to her, Oglander v. Baston, IVern. 396. Garforth v. Bradley, 2 Vez. 677. The reason of this distinction appears to be, that his bringing the action in his own name alone is a disagreement to the wife's interest, and implies his intent that it should not furvive to her; but if he bring the action in the joint names of himfelf and his wife, the judgment being that they both recover, the furviving wife, not the representative of the husband, is to bring the scire facias

fession survive to the wife, except the husband dispose of or forfeit them during the

on the judgment: his bringing the action, therefore, in the joint names of himfelf and his wife, does not in effect alter the property, or shew it to be his intention that it should be altered." See Mr. Butler's note (1), Co. Litt. 351. b. From the above distinction it should follow, that where the husband fue alone, the recovery will be equal to a reducing into possession; and such was expressly flated to be the law by Lord Hardwicke, in Garforth v. Bradley, 2Vez. 677. But in Bond v. Simmonds, 3 Atk. 21. his Lordship is reported to have faid, "Suppose at law a husband had recovered a judgment for a debt of the wife, and had died before execution, the wife would have been entitled, and not the husband's executor." This dictum, unless the wife was joined in the action, is irreconcileable with his Lordship's opinion in Garforth v. Bradley, and is also opposed by the authority of Lord Jefferies, in Oglander v. Baston, 1 Vern. 306. It is, however, agreeable to Lord Macclesfield's opinion, in Packer v. Wyndham, Pre. Ch. 415. and Nanny v. Martin, 1 Ch. Ca. 27. Whether the benefit of a decree respecting the property of the wife, detained by the court in order to compel the husband to make a fettlement, shall vest absolutely in the wife surviving her husband, seems also a doubtful point. In Nanny v. Martin, 1 Ch. Ca. 27. it was held, that the benefit of fuch a decree should furvive, as would the benefit of a judgment at law. But in Packer v. Wyndham, Pre. Ch. 418. Lord Cowper C. observed, that "the money in question, being paid in during the coverture, was the husband's money, and the pro(2) Co. Litt. 46. b. 351.

the coverture (2); and he cannot charge or devise them, for the title of the wife

perty vested absolutely in him by law; and though this court thought fit to lay their hands on it, and had power fo to do, being paid into the master's hands, yet that was only in the nature of a caution, till the hufband should make some provision for his wife: it was the husband's money, but the court had a power to detain or keep it from him till he made fuch provision. But the wife being now dead, and no children to be provided for, the reason of their keeping the money from him is at an end, and then, æquitas fequitur legem, the court must give it to the husband's representatives, to whom, by law, it belongs." In a MSS. note of Carteret v. Pafchal, more full than the printed report in 3 P. Wms. 197. Lord C. King, referring to the case of Packer v. Wyndham, observes, that the reason why the court decreed the money to the husband's assignees, was, because they had laid their hands on it, and the husband could not come at it: he brought his bill, and did all he could to get possession of it; so the court thought it unreasonable to deprive the party of his right by law, through any act of theirs." "Besides, a decree of this court, for the performance of a thing, is altogether like a tenancy by elegit; for transiit in rem judicatam." See also Heygate v. Annesly, 3 Bro. Rep. 362. but in Macauley v. Phillips, 4 Vez. 15. it was held that a decree would not exclude the wife's right of furvivorship, unless a settlement had been approved in purfuance of it.

(2) If the fettlement was made before marriage,

wife is paramount (3). But a demife of the wife's term, though but for a fort-night (a), will alter the property (4). So things merely in action furvive to the wife, unless recovered during the coverture, or disposed of by the husband for a valuable consideration (b). But an award of a sum of money is a fort of judgment, and changes the property of a legacy in her

(3) 1 Roll's Ab 344. pl. 5. Co. Lit. 351. a. (4) Oglander v. Bafton, 1 Vern. 396.

or after marriage, in confideration of an agreement before marriage, the court will not advert to the adequacy, Adams v. Cole, Forrest. 168. But if the settlement be after marriage, then the adequacy of it will be material, Lanoy v. D. of Athol, 2 Atk. 448. See 3 Vez. 98. Langham v. Nenny, 3 Vez. 467.

- (a) Such a demise would be good for the fortnight, but does not appear to be sufficient to exclude the wife surviving from the residue of the term; Lord Coke expressly observing, that "if a man, possessed of a term of forty years in right of his wife, maketh a lease for twenty years, reserving a rent, and die, the wife shall have the residue of the term," Co. Litt. 46. b. Syms' case, Cro. Eliz. 33. Loster's case, Cro. Eliz. 278.
- (b) "As the husband may assign the wife's term, so he may the trust of the wife's term, unless it be a trust from himself (or to which he is party) for the wife's benefit; he may also dispose of the wife's mortgage in see, (Bosvil v. Brander, 1 P. Wms. 458.) as well as her mortgage for a term; he may also assign

her

(5) Oglander v. Balton, 1 Vern. 396.

her right (5). And so if the husband recover it, as he may without joining his wife; for wherever the husband is to have the thing alone, when recovered, there he need not join his wife; yet of things merely in action, belonging to the wife, fhe ought to join in fuit (c), and a covenant to pay it to the husband is but a collateral fecurity, and does not alter the nature of the debt, but it shall survive to the wife (6). But it is a rule in all cases, that where a man makes a settlement equivalent to the wife's portion, it shall be intended that he was to have the portion, though there was no agreement for that purpose (d); the wife shall not have her

(6) Howman v. Corie, 2 Vern. 190.

her choses in action, or a possibility to which she is entitled, (see note (y) p. 313.) provided such assignment be for a valuable consideration; but though he cannot dispose of her choses in action without a valuable consideration, yet he may release the wise's bond without receiving any part of the money," Bates v. Dandy, 2 Atk. 207.

(c) In all actions real for the lands of the wife, the husband and wife ought to join, Odill v. Tyrrell, I Buls. 21. So for rent due in right of the wife, I Com. Dig. 575. I Roll's Ab. 347. But where the wife cannot have an action for the same cause, if she survive her husband, the action shall be by the husband alone, I Com. Dig. 576. I Roll. Ab. 347.

(d) This

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her jointure and fortune both, but the law of this court will prefume a promife (7).

(7) Blois v. Lady Hereford, 2 Vern. 502.

(d) This appears to have been the opinion of Lord Cowper, in the case referred to, Blois v. Lady Hereford. See also Cleland v. Cleland, Pre. Ch. 63. Meredith v. Wynn, Pre. Ch. 312. But in Salwey v. Salwey, Ambler, 692. it was held by the Lords Commissioners, that to exclude the wife from that which the law would give her, as furviving her husband, there must be an express or implied agreement, and that a fettlement by the husband on the wife is not alone fufficient for fuch purpose; and so it had been held in Lister v. Lister, 2 Vern. 68. See Adams v. Cole, Forrest. 168. and ante, p. 92. and cases there referred to.

SECTION XXV.

A ND it is a common maxim (1), that (1) Co. Litt. he who has the precedency in time, b. 3. c. 7. 11. has the advantage in right (e): not that time,

14 a. Puff.

(e) This rule holds good in respect of equitable rights, as well as in respect of legal rights; per Lord Hardwicke, Clarke v. Abbott, Barnard. 460.; and therefore, where the legal estate is standing out, equitable

time, confidered barely in itself, can make any fuch difference, but because the whole power over a thing being fecured to one person, this bars all others from obtaining a title to it afterwards. So in equity, where one party has no more equity than

equitable incumbrances must be paid according to their priority in time, Symes & al. v. Symonds, I Bro. R. C. 66. E. of Bristol & al. v. Hungerford, 2 Vern. Brace v. Duchess of Marlborough, 2 P. Wms. E. of Pomfret v. Lord Windsor, 2 Vez. 486. Wortley v. Birkhead, 2 Vez. 571. 3 Atk. 809. But the rule is only applicable to mere equities, Blake v. Hungerford, Pre. Ch. 159. If therefore a subsequent incumbrancer, in order to protect himself against mesne incumbrances, obtains a conveyance of the legal effate, equity will not deprive him of his legal advantage, unlefs, at the time he lent his money, he had notice of the mesne incumbrance, or obtained the conveyance of the legal estate after decree; for though the second or mesne incumbrance be prior to the subsequent incumbrance in point of time, yet it furnishes a merely equal equity with the fubfequent incumbrancer, who, having by greater diligence obtained the legal estate, shall be allowed to retain his advantage, Turner v. Richmond, 2 Vern. 81. Hawkins v. Taylor, 2 Vern. 29. Morrett v. Paske, 2 Atk. 52. Matthews v. Cartwright, 2 Atk. 347. Belchier v. Renforth, 6 Bro. P. C. 28. Robinson v. Davison, I Bro. Rep. 63. But if the second or mesne incumbrancer has obtained a decree for an account, a fubfequent incumbrancer cannot, by buying in the first incumbrance, defeat the effect of such decree, Wortley v. Birkhead, 3 Atk. 809.

the

the other (f), the law must take place (2); and therefore, where it is voluntary conveyance, you must try it at law (3). And as a voluntary conveyance cannot be revoked without a power of revocation (4), so the reason is the same where it is not pursued, because the law has been liberal (g) in expounding powers of revocation favourably (5), and where the law expounds a thing according to an equitable construction, there is no reason for equity to extend it further; for it is a law which a man puts upon himself as a guard

(2) Francis's
Maxims, max.
14. where the
caies illustrative
of this rule, are
classed.
(3) Goodwin v.
Goodwin, 1 Ch.
Rep. 92.
(4) Villers v.
Beaumont,
1 Vern. 100
Bale v. Newton,
1 Vern. 464.
3 Ch. Ca. 107.
(5) Shepherd's
Touchstene,
524. 6th Ed.
Powell on
Powers, 112,
114.
Sayle v. Freeland, 2 Ventr.
350.
Kibbet v. Lee,
Hob. 312.

- (f) "Supposing a plaintiff to have a full title to the relief he prays, and the defendant can set up no desence in bar of that title, yet, if the desendant has an equal claim to the protection of a court of equity to desend his possession, as the plaintiff has to the assistance of the court to assert his right, the court will not interpose on either side," Mr. Mitsord's Treatise, p. 215. I shall have occasion to consider the application of this rule in B. 6. c. 3.
- (g) In Zouch v. Woolston, 2 Burr. 1147. Lord Manssield held, that whatever is an equitable, ought to be deemed a legal execution of a power; and the reason is obvious, " for powers were originally in their nature equitable, but by the statute of uses are transferred to common law." See Earl of Darlington v. Pulteney, 1 Cowp. 266.

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against

(6) Thornev.
Newman,
cited 3 Ch.
Ca. 68.
Bath v. Montague, 3 Ch. Ca.

against surprize, and therefore ought to be performed in all necessary circumstances (6). But if there appear other equitable considerations, it would be convenient to give relief where there is a defect in the execution of a power, and an intention plain to do it (b), as well as to supply a defect in a conveyance; for

(b) "There is a distinction, however, between the non-execution of a power and a defective execution of a power; for though the court will, under certain circumstances, help the latter, it will never aid the former, because so to do, would be repugnant to the nature of a power, which always leaves it to the free will and election of the party, to whom the power is given, to execute it or not; for which reason equity will not compel the execution of a power, or construe the act as done, when there is no evidence of the intention of the party to do it." Tollett v. Tollett, 2 P. Wms. 490. See also Powell on Powers, 157. The declaration of fuch intent is however a fufficient ground for the interference of a court of equity, Arundel v. Philpot, 2 Vern. 69. A covenant in a marriage-fettlement, referring to a power, or to the estate to which the power attaches, is, in respect of the confideration, a sufficient indication of an intent to execute such power, Fothergill v. Fothergill, 2 Freem. 256. Clifford v. Burlington, 2 Vern. 379. Hollingshead v. Hollingshead, cited 2 P. Wms. 220. See also Coventry v. Coventry, 2 P. Wms. 222. and Francis's Maxims, Alford v. Alford, there cited, and Sarth

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it is a pro tanto part of the old dominion (7): as, 1st, Where there is a confideration, either valuable or foreign; as for payment of debts, or provision for children (8), and no better on the other fide (i). 2dly, Where there is any fraud, or the party is guilty of any deceit or falfehood, by which the execution is prevented; for he in the remainder shall not take advantage of his own wrong (9). 3dly, Accident or an impossibility of complying with the circumstances, fince it would be unconscionable in the remainderman to take advantage of these, provided he does all he can (k). And fo in other cases of powers; as to make leases (10), equity

(7) Bath and Montague's cafe, 3 Ch. Ca, E. of Coventry's cafe, Francis's Maxims, 18. Gilb. Rep. 160. 2 P. Wms. 222. 1 Str. 596. (8) Smith v. Alhton, 1 Ch. Ca. 264. Bath and Montague's cafe, per Treby, 3 Ch. Ca. 89. Pollard v. Grenvil, 1 Ch. Ca. 10. Tollett v. Tollett, 2 P. Wms. 490. Cotton v. Layer, 2 P. Wms. 622. Harvey v. Harvey, 1 Atk. 563. E of Darlington v. Pulteney,

Cowp. 260. Sneed v. Sneed, Amb. 64. Wade v. Paget, 1 Bro. Rep. 363. (9) Bath and Montague's case, 3 Ch. Ca. 89. 108. 122.93. (10) Pollard v. Lord Grenvil, 1 Ch. Rep. 98. 1 Ch. Ca. 10. Rattle v. Popham, 2 Str. 992. reversed by Lord Talbot C. See 2 Burr. 1147.

Sarth v. Blanfry, Gilb. Rep. 166. Vernon v. Vernon, Amb. 3.

- (i) I have already had occasion to refer to the cases in which courts of equity will supply any defect in the surrender of a copyhold estate, and as their interference in cases of a defective execution of a power proceeds upon the same principle, it seems to follow, that it is bounded by the same considerations.
 - (k) In Bath and Montague's case, 3 Ch. Ca. 69. 93.

equity will relieve the defective execution of them (/), where there is any fraud or accident.

it is faid by the two chief justices, that if the party appear to have intended to execute his power, and is prevented by death, equity shall interpose to effectuate his intent, for it is an impediment by the act of God; and the case of Smith v. Ashton, 1 Ch. Ca. 264. Finch's Rep. 273. is relied on as an authority to fuch effect; but this not being an original opinion of the learned Chief Justice's, but being founded on the case cited, it can be carried no farther than that case warrants; and upon reference to the circumstances of that case, it will be found to afford an authority rather against, than in support of the notion, that where a man is only preparing to execute a power, and dies before he does execute it, the preparatory steps amount to fuch an execution as equity will make effectual; for it is observable that the court, in Smith v. Ashton, directed an issue to try whether the notes or instructions for the will, from which the intent of the donee of the power was inferred, were part of his will; which iffue would have been unnecessary, if the court could have relieved upon the foot of preparatory measures only. The relief afforded in that case must therefore be referred to the refult of the iffue; which was, that the notes or instructions were part of the will. See Coventry v. Coventry, Francis's Maxims, p. 16.

(1) This must be understood of such leases as are not derived under powers limited in their nature to a particular mode of execution; for, "in the construction of powers originally in their nature legal.

accident, or a valuable confideration (m). But there is a great difference between a defective execution of a power, and where the power was not executed at all (11); especially if the power be general, it is not such a lien upon the lands as should affect a purchaser, though it had been afterwards executed (12). Nor has the court gone so far, as where a man has a power to raise, if he neglect to execute that

(11) Tollett v. Tollett, g P. Wms. 490.

(12) Elliott v. Hele, 2 Vern. 406. 2 Ch. Ca. 29. 87.

courts of equity must follow the law, be the consideration ever so meritorious: for instance, powers by tenant in tail to make leases under the statute, if not executed in the requisite form, no consideration, however meritorious, will avail. So with respect to powers under the civil list act, powers under particular family entails, as the case of the Duke of Bolton, &c. equity can no more relieve from them than it can from defects in a common recovery. The principle upon which the rule of construction is founded in these cases, is, that there is nothing to affect the conscience of the remainder-man;" per Lord Manssield, Earl of Darlington v. Pulteney, Cowp. 267,

(m) In the case of desective executions of powers, it is not necessary, in order to induce the interserence of a court of equity, that the consideration should be strictly valuable; but it is sufficient that it be meritorious, that is, sounded on some moral obligation. But, if there be no consideration, equity will not interpose, M'Adam v. Logan, 3 Bro. Ch. Rep. 310.

power,

(13) Laffels v. Lord Cornwallis, 2 Vern, 465. power, to do it for him (n), although it might be reasonable enough, and agreeable to equity in favour of creditors (13).

(n) As to what shall be deemed the execution of a power of appointment by will, the rule is laid down in Sir Edward Clare's Case, 6 Rep. 17. that where one has a power to appoint by will, and makes a will, but without any reference to the power, the appointment shall have no effect unless the will would otherwife have no operation, fee also Buckland v. Barton, 2 H. Bla. Rep. 139. But though equity will not, even in favour of creditors, execute a power which the party himself has omitted to execute, yet if a general power be executed in favour of a volunteer, though a child, it feems agreed by all the cases, that the money shall be affets for the benefit of creditors, Thompson v. Towne, 2 Vern. 319. Hinton v. Toye, 1 Atk. 465. Townsend v. Wyndham, 2 Vez. 1. Pack v. Bathurst. 3 Atk. 269. Troughton v. Troughton, 3 Atk. 656. Nor can a power be fo framed as to protect an appointment under it, from payment of the debts of the appointee, Alexander v. Alexender, 2 Vez. 640. See Powell on Powers, 372.

SECTION XXVI.

AND it often falls out, that even not to keep one's promise shall be just; for all must be referred to the sundamental rules

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rules of justice (1): as, 1st, That no man be wronged; and, 2dly, That the public good be as far as possible promoted. if the agreement is extremely unreasonable and iniquitous, equity will not carry it into execution (o); as where the daughter and her husband would have more than the father intended, and would have left the mother and two daughters unprefer-But although a written agreered (2). ment, being unreasonable, the court will not carry it into execution; yet they will decree, that it be delivered to the person for whose benefit it was defigned (3), that he may have an opportunity to make the most of it at a trial at law (p).

(1) Puff. B. 3. c. 5. f. 9. Cicero de Officiis, lib. 1.

(2) Anon, 2 Ch, Ca. 17.

(3) Squire v.
Baker, 27 Feb.
1726.
5 Vin, Ab.549.
pl. 12.
Ground, and

Rud. of Law and Equity, p. 76.

- (a) It is a maxim in equity, that he who hath committed iniquity shall not have equity, Francis's Maxims, max. 2. It is therefore necessary that agreements, to be enforced in equity, should be consistent with the principles of equal justice and good conscience. See Buxton v. Lister, 3 Atk. 386. Young v. Clerk, Pre. Ch. 538. Philips v. D. of Bucks, I Vern. 227. Savage v. Taylor, Forrest. 234. Shirley v. Stratton, I Bro. Rep. 440. Barnardiston v. Lingood, Barnard. 341.
- (p) Where a demand is founded on a forged or grossly fraudulent instrument, courts of equity will direct the instrument to be deposited with one of its officers; and that

that the party claiming under it bring his action within a limited time, or, on failure, that the instrument be cancelled, Bishop of Winchester v. Fournier, 2 Vez. 445.

SECTION XXVII.

the laches and indolence of the parties, but will presume (q), after great length of time, some composition or release

(q) The numberless inconveniencies which would refult from persons being allowed to contest or set up demands at any distance of time, have induced the legislature to prescribe the time within which certain rights must be pursued; and in such instances length of time operates as a bar; but there are many cases to which the provisions of the legislature do not extend, but to which the principle of fuch provisions strongly applies. In fuch cases length of time is not allowed to operate as a bar, but merely as furnishing evidence, either of the right having been conferred, or the demand having been fatisfied, though the particular instrument, under which the right was derived, or the evidence to shew that the demand was extinguished, be loft. Upon this ground courts of law have thought that a jury ought to prefume any thing

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release to have been made (1); fince it would be too hard to force a man to keep

(1) Southcote v. Southcote, 1 Ch. Rep. 58. Bonnington v. Waithall,

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2 Ch. Rep. 114. Sherman v. Sherman, 2 Vern. 276. Bridges v. Mitchell, Gilb. Rep. 224. Western v. Cartwright, Sel. Ca. Ch. 34. Sturt v. Mellish, 2 Atk. 610. Comber's case, 1 P. Wms. 766. Macdowell v. Halfpenny, 2 Vern. 484.

to support a length of possession, Eldridge v. Knott, Cowp. 214. And a grant or charter from the crown, which ought to be matter of record, may, under certain circumstances, be prefumed, though within time of legal memory; the Mayor of Kingston, &c. v. Horner, Cowp. 102. So may an actual ouster of a tenant in common be prefumed from the adverse possession of his companion, for any confiderable length of time, as forty years, Fisher v. Prosser, Cowp. 217. And as courts of law will leave it to the jury to prefume from length of time the means by which a right can be fupported, fo will they, under certain circumstances, leave it to the jury to prefume, from length of time, the extinguishment of a right; as where interest has not been paid on a bond for twenty years, or even for eighteen years, a jury may prefume the bond to be fatisfied. See Rex v. Stephens, 1 Burr. 433. though courts of law will confider length of time, matter of evidence from which a jury may draw their inferences, either in support or in destruction of a right; yet courts of equity have in some cases found it necessary to interpose, Powell v. Godfall, Rep. Temp. Finch, 77. originally, perhaps, from courts of law not giving to length of time, where it did not operate as a bar, the weight to which they now conceive it to be entitled. Where a person has been in possession for a great length of time without interruption, equity will prefume or fupply all those circum-

stances.

his evidence by him for ever; and therefore a legacy shall be prefumed to be paid after

stances, or formal ceremonies, which the law deems necessary to the operation of the original conveyance; as livery, furrender, &c. Knight v. Adamson, 2 Freem. 106. and will not allow fuch possession to be disturbed, Lyford v. Coward, 1 Vern. 195. Or where a common has been inclosed for thirty years, equity will prefume the inclosure to have been with the confent of all persons interested, and will not allow it to be thrown open, Silway v. Compton, 1 Vern. 32. So where rent has been paid for twenty years, equity will prefume a grant, Steward v. Bridger, 2Vern. 516. Where a legatee has been abroad for many years his death may be prefumed, Dixon v. Dixon, 3 Bro. 516. Equity will also presume an agreement to be abandoned or discharged, if not insisted on during any length of time, Powell v. Hankey, 2 P. Wms. 82. Orby v. Trigg, 9 Mod. 2. See Hervy v. Dinwoody, 4 Bro. Rep. 257. in which the principle and authorities upon the fubject are very fully confidered.

But though courts of equity will interpose, in order to prevent those mischiess which would probably result from persons being allowed, at any distance of time, to disturb the possession of another, or to bring forward stale demands; yet, as its interserence in such enses proceeds upon principles of conscience, it will not encourage, nor in any manner protect, the abuse of considence; and therefore no length of time shall bar a fraud, Cottrel v. Purchase, Forrest. 61. unless it appears that the circumstances of fraud imputed were known to the party, and that with such knowledge he had laid by a considerable time; in which case length

after great length of time; as where the testator has been dead forty years (r). So when a contract has lain dormant many years, there shall be no specific performance (2). But special circumstances may alter the case; as if there are articles upon marriage to purchase lands, and to settle

(2) Wingfield v. Whaley, 5Vin. Ab. 534pl. 38.

of time may be objected, as otherwise the mere imputation of fraud might operate a fraud, as the evidence might be lost by which the imputation might have been repelled, see Shelly v. Brewster, Rolls. T. 1795. Weston v. Cartwright, Sel. Ca. Ch. 34. Nor affect a trust, March, 129. Parker v. Ash, 1Vern. 256. Ld. Kinsland v. Ld. Tyrconnel, 1Vin. Ab. 186. pl. 10. nor exclude the taxation of an attorney's bill for costs, &c. Walmsley v. Booth, 2 Atk. 25. Newman v. Payne, 2 Vez. Jun. 202.

(r) Though length of time will not bar a legacy, because it may have been kept back on account of all the debts not being paid, yet it feems clear that it will raise a presumption of its having been paid: which prefumption, unless repelled by evidence of particular circumstances, will be conclusive, Parker v. Ash, I Vern, 256. Jones v. Turberville, MS. 20 Nov. 1792. Higgins v. Crawford, 2 Vez. Jun. 571. But if the legatee alledge that he knew not of his right, it should feem that the prefumption could not be raifed. See Ord v. Smith, Sel. Ca. Ch. 11. Nor does the case of Fotherby v. Hartridge, 2 Vern. 21., to which our author probably refers, afford an authority to the contrary; for that case was involved in many circumstances, and it was particularly alledged, that the legatee had received more than the amount of her legacy.

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(3) Hales v.

Hales v.

Hales,

1, Ch. Rep.

pl. 56. (6).

(4) Coles v.

Emmerion,

1, Ch. Rep. 42.

Carpenter v.

Tuczer,

1, Ch. Rep. 42.

Geoffey v.

Thorn.

them within three years, these shall not be waved by length of time, if the covenantor has been in trade, and could not conveniently spare money. And although a sleeping mortgage (3) or bond (4) shall be presumed to be discharged, and not substituting, if nothing appears to the contrary, as by payment of interest, or a demand made, or the like (s); yet a will has been

1 Ch. Rep. 47. 6 Mod. 22. Humphreys v. Humphreys, 3 P. Wms. 395. Gratwick v. Simpson, 2 Ack. 144. Wood's Inft. 599,

(s) From the case referred to it appears, that where the mortgagor has been allowed to continue in possesfion, the mortgage shall, after a length of time, be prefumed to have been discharged, unless circumstances can be shewn sufficiently strong to repel such presumption; as payment of interest, or a demand and promife to pay, &c. And as equity will raife this prefumption in favour of a mortgagor in possession, a fortiori, ought it to be prefumed that the mortgagor has conveyed or deferted his equity of redemption, where the mortgagee appears to have been in possession for a great length of time, twenty years or upwards, no interest having been paid, nor any other circumstance appearing, from which it can be inferred, that the mortgage is still subject to redemption? The rule of equity, therefore, is, that the equity of redemption shall be prefumed to be deferted by the mortgagor, after twenty years forfeiture, and possession taken by the mortgagee, no interest having been paid in the mean time, unless the mortgagor be capable of producing circumstances

been set aside after forty years possession under it (t), and even in prejudice of a purchaser,

circumstances to account for his neglect; such as imprisonment, infancy, coverture, or by having been beyond fea, and not having absconded. Blewett v. Thomas, 2Vez. Jun. 669. St. John v. Turner, 2Vern. 418. I shall have occasion to discuss this subject more particularly in B. 3. c. 1. f. 6. and therefore beg for the present to refer to Mr. Powell's Treatise on Mortgages, p. 135, 136. where the cases are brought together, and the distinctions very accurately taken. With respect to demands founded on bonds of an old date, as twenty years, payment will be prefumed, Humphreys v. Humphreys, 3 P.Wms. 396. Gatwick v. Simpson, 2 Atk. 144. But this prefumption of payment may, like every other mere prefumption, be encountered by evidence to repel it; as if interest be proved to have been paid within the time conceived to furnish the prefumption, Lord Barrington v. Searle, 8 Mod. 278. 2 Ld. Raym. 1370. 3 Bro. P. C. 535. See also Turner v. Crisp, cited 2 Str. 827. But if no evidence be adduced to repel the prefumption of payment arifing from the lapse of time, a bond of twenty years old shall be prefumed to have been fatisfied, though it still remain in the hands of the obligee, Wood's Inft. 500.

(1) The case referred to is certainly not reconcileable with Winchcomb v. Hale, 1 Ch. Rep. 22. in which it was held, that after twenty years and two purchases, it was not proper for the court to examine whether the devisor was non-compos or not; neither is such decision consistent with the rule, that equity will

purchaser, upon account of the infanity of the devisor (5).

(5) Squire v. of the (Pershall, Feb. 1726, 8 Vin. Ab. pl. 13.

not interpose, against a purchaser for valuable consideration, without notice of the objection imputed to his title.

CHAP. V.

What a sufficient consideration to make an agreement binding.

SECTION I.

LET us now inquire what shall be deemed a sufficient consideration to make a pact or covenant valid (a); for although

(a) " A confideration of some fort or other is so absolutely necessary to the forming of a contract, that a nudum pactum, or agreement to pay any thing on one fide, without any compensation on the other, is actually void in law, and a man cannot be compelled to perform it," 2 Bla. Com. 445. This definition of nudum pactum raises two questions: first, Whether every verbal agreement, without confideration, is nudum pactum? and fecondly, Whether any agreement can, for want of confideration, be nudum pactum, if fuch agreement be reduced into writing? The civil law is fo generally referred to in the discussion of this fubject, that it may be material to take a curfory view of the different means by which a legal obligation was created by that law, in order to shew, that, though we have borrowed the phrase nudum pactum from the civil law, and the rule which decides upon the nullity of its effect, yet that the common law has not in any degree been influenced by the notions of the civil law, in defining what conflitutes nudum pactum. By

although in donations, and fuch like contracts, where there is no apparent confideration.

By the civil law obligations were created, either ex contractu, aut quasi ex contractu, aut maleficio, aut quafi ex maleficio; obligations induced ex contractu, which are alone necessary to our present investigation, " contrahuntur, aut re, aut verbis, aut literis, aut confensu," Inst. lib. 3. tit. 14. Obligations re interveniente were contracted by the intervention or delivery of the thing itself by one party, to the restitution of which, or of fomething equivalent in kind, the other party was obliged, Inft. lib. 3. tit. 15. Obligations created by words were termed stipulations, Inst. lib. 3. tit. 16. The agreement or promife was authenticated, confirmed, and ratified, by answers given by the party promifing to certain questions; and it derived its force and validity from the folemnity of its form, which was prescribed for the purpose of distinguishing the well-weighed and deliberate promife or agreement from the loofe and inconfiderate. The question referred to the nature of the undertaking; as dare spondes? spondeo-facere spondes aut facies?-faciam-promittis? promitto-&c. In no part of the folemnity does the confideration of the promife or agreement appear to have been adverted to, the civil law recognizing the right of a man to bind himself without any consideration, and merely interpoling certain forms, in order to guard against surprise, and to evidence the terms and extent of the promise or undertaking. I am aware that the civilians are stated to have held, that every contract implied a reciprocity or exchange, what the Greeks termed συναλλαγμα, the civilians, permutatio, 2 Bla. Com. 444. The learned commentator refers to the

fideration, the bare pleasure of doing good to others stands in the place of a cause on

the authority of Gravina in support of this proposition, and has in a note stated the passage on which he relies: "In omnibus contractibus, five nominatis, five innominatis, permutatio continetur." Gravin. lib. 2. f. 12. The paffage, however, when examined, will be found materially qualified: it runs thus,-" In contractibus, fere omnibus, five, &c." But though Gravina fails Sir Wm. Blackstone; Connanus, a highly respectable authority, appears to furnish considerable strength to his opinion. His reasoning has, however, been very closely attacked and confuted by Grotius, lib. 2. c. 11. f. 1. and by Vinnius, 596. 4to ed. who thus expresses his opinion: " Nos vero hoc certo tenebimus fubstantiam contractus non in eo confistere ut ultro citroque obliget, fed non minus proprie fi unus tantum alteri quam fi invicem contrahentes inter fe ex conventione obligentur, contractam dici obligationem, et negotium ipsum appellari et esse contractum." And in another paffage the fame learned civilian observes, "Illud tamen addendum fummo adhuc jure ex stipulatione fine causa nasci actionem sed inefficacem eam reddi opposità doli mali exceptione," 611. And, indeed, the reason of introducing the forms of stipulation of itself abundantly proves that the confideration or motive of the agreement was not regarded: "Stipulationis introducendæ ratio hæc una fuit ut difcerni posset an promissio temere effusa an vero consulto concepta effet.-Stipulatio namque eâ formâ modoqueconcepta non nisi meditatè perficitur et plane distinguitur a nudo pacto a quo sæpe consensus leviter interponitur; qua ratione quamvis alias honestum sit pacta Vol. I. fervari

on the part of the person who receives the benefit, and gives nothing (b); yet there

fervari ex nudo pacto actionem dari jus civile prohibuit ne homines facile verbis caperentur et ut litium quæ inde exoriri poffent occasio tolleretur," Perezii Prælectiones, 2. p. 71. That the object of the forms prescribed was to give to verbal promifes a binding and legal force, appears also from Vinnius: "Nimirum leges Romanæ ex nudâ conventione neminem obligari voluerunt ne qualecumque promissum et sermo sæpe inconfultus magis quam a voluntate proficifcens necessitate juris promittentem illigaret et litium quoque, ut opinor, præcidendarum caufa.—Sed excogitata est conventio certo modo et formà concipienda celebrandaque quam deliberati animi certum fignum effe voluerunt et ex quâ certo jure actio competeret quam conventionem stipulationem dixerunt." "Stipulationis vinculo cæteræ quoque conventiones et obligationes firmantur quod videre est tum in pactionibus nudis quæ per se jure civili infirmæ fint ad producendam actionem, stipulatione muniendæ funt," Vinnius, 611. Whence it appears, that verbal promifes, which did not take effect by the intervention or delivery of the thing, or, ex confensu, which species of contracts will be prefently confidered, were nuda pacta ex quibus non oritur actio, until confirmed verbis præscriptis solemnibus, when they became legally binding, and fufficiently strong to fustain an action, whatever might have been the original motive, inducement, or confideration, which led to fuch verbal pact or agreement. The written acknowledgment of a loan or debt was the obligatio literarum; but a written acknowledgment of a debt was not in all cases sufficient to induce

there is a difference between a gift perfected and executed by livery in the lifetime

duce a complete or even prefumptive obligation. "Sciendum est non cujuslibet chirographi aut cautionis hanc vim esse ut confitentem obliget, sunt enim quædam cautiones et confessiones debiti plane inutiles; quales funt quæ caufam debendi non continent quas indiscretas vocant, cum scilicet quis confessus est se debere nullà nominatim expressa causa propter quam debeatur .- Cæteræ, quæ certam debendi causam continent, utiles quidam funt, fed non omnium una est vis idemque effectus.-Etenim harum quædam ad probationem tantum et fidem rei gestæ valent, ad obligationem nunquam; quædam vim habent obligationis, nunquam probationis folius: ad folam probationem valent confessiones debiti omnes quæ non funt de pecunia mutua," Vinnius, 664. From this passage it appears, that no confideration being stated, might be fatal to even a written acknowledgment; and from the following passage it appears, that where a consideration was stated, it might in all cases be contested within a certain time (two years); and in the case of a loan, the lender might be put upon proving it by the exception de non numeratâ pecuniâ. " Quia tamen iniquum foret ut is qui nihil accepit, quafi accepisset, ex cautione teneretur, optimo jure obtinuit, ut de pecunia non numerata intra certum tempus excipere liceret," Perezii Prælectiones, in lib. 4. ti. 30. Cod. de non numeratâ pecuniâ. But this exception, de non numeratâ pecuniâ, applied only to the case of loans. "Si quis se debere scripserit ex alia causa ut emptionis, locationis, et id genus non utitur exceptione non numeratâ pecunia in quibus Z 2

time of the parties, and a bare promife to give, or a gift imperfect and executory. And

five scriptura sit publica (quæ plenam sidem facit) five privata qua quis fateatur quidem a se profectam fed neget pecuniam esse numeratam standum est tamen scripturæ donec apertissimis argumentis rem aliter esse gestam probet." Effectus hujus exceptionis (de non numerata pecunia) hic est quod rejiciet onus probandi in adversarium ita ut donec probaverit numerationem a fe factam non cogatur ad folutionem debitor," Perez. ubi. fup. The fourth mode by which an obligation could, by the civil law, be created ex contractu, was ex confensu; which was so called because nothing was requifite to its perfection but the confent of the parties, " nihil præter consensum habentes hæ obligationes confenfuales vocantur:" whereas to other contracts it has been shewn, that the intervention or delivery of the thing, or certain formal words, or a written instrument, were necessary. Of this species of contract were emptio, venditio, locatio, conductio, focietas et mandatum, which were nominate contracts. From this view of the different modes by which an obligation could be created by the civil law, it appears, that without any confideration a verbal agreement or promise might, in respect of certain prescribed solemnities, acquire a binding force and legal validity; and further, that for want of a confideration, a written acknowledgment of a debt might be avoided; and that though a confideration was alledged in writing, it might be denied. If then it be asked, What was nudum pactum by the civil law, I should submit, that from the above observations it appears to have been an undertaking to give or to do fome particular thing

And even fince the statute of 3 and 4 Ann. cap. 7. a note is but evidence of a

or act, which neque verbis præscriptis solemnibus vestitum sit, neque sacto aut datione rei transsit in contractum innominatum. See Erskine's Inst. 456. Grotius, lib. 2. c. 11. s. 1. notâ Gronovii, (1).

Having referred to the different authorities whence the rule of the civil law, respecting nudum pactum, may be collected, I shall now proceed to consider whether every verbal agreement, not founded on some confideration, is absolutely void or nudum pactum by the common law. To the validity of some verbal agreements, the civil law required certain folemnities by which they were authenticated and confirmed; but our law having no prescribed forms correspondent or analogous to those solemnities, considers verbal agreements, unless fanctioned or induced by some confideration express or implied, as absolutely void, or nuda pacta, Plowden, 308. b. Dyer, 336. b. as a merely naked promife induces a moral obligation on the part of him making it, (see Erskine's Inst. 457.) our law may be faid to be defective in not enforcing it. See Doctor and Student, Dial. 2. c. 24. Pothier Traite des Obligations, partie 1. c. 1. f. 1. art. 1. f. 2. Sir Wm. Jones's Law of Bailment, 56, 57. The reason affigned by Plowden, that words are frequently spoken without much confideration, is certainly not conclufive; for if, by a voluntary deliberate promife, an expectation is raised, it seems more favourable to good conscience to enforce the promise, than to disappoint the expectation. Nor do I think the reason assigned by Grotius, lib. 2. c. 11. f. 3. that it is one of the instances

confideration, which it was not before (c), and turns the proof on the defendant the drawer,

in which obligatio fit in nobis et nullum jus in alio, an answer to this objection; for though I agree, that every moral obligation does not confer a legal right, yet where the question is, Whether a moral obligation, founded on an express though verbal promise, ought not in policy to confer a legal right? the rule, Fides fervanda feems applicable, which it is not in those instances to which Grotius refers. It is unnecessary to pursue this point further; for whatever objections may be urged against the rule, it seems now to be firmly established, that at law, a consideration of some fort or other is absolutely necessary to the legal validity of a verbal agreement: I shall therefore proceed to confider, Whether an agreement, reduced into writing, can for want of confideration be deemed nudum pactum? The question was very much discussed by Mr. Justice Wilmot, in the case of Pillans v. Van Mierop, 3 Burr. 1670. The learned judge, on that occasion, admitted, that there was no radical defect in a contract for want of confideration, and that the policy of the civil law, in prescribing certain forms, was merely to guard against furprize, and that the agreement being reduced into writing, is a fufficient caution against surprize; but declined giving his opinion, whether an agreement is always good when reduced into writing, fee Rann v. Hughes, 7 Term Rep 350. in a note. That the civil law did not confider the circumstance of the agreement being reduced into writing equivalent to the verba folemnia, or flipulation, has been already shewn. If, however, an agree-

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drawer, that there was no confideration.

But the acceptor and indorfor of a bill of
exchange

ment be evidenced by bond or other instrument under feal, it would certainly be feriously mischievous to allow its confideration to be disputed, the common law not having pointed out any other means by which an agreement can be more folemnly authenticated. Every deed, therefore, in itself imports a consideration, though it be only the will of the maker, and therefore shall never be faid to be nudum pactum, Plow. 308. Burr. Rep. 1637. But writings of a less folemn nature, though in some cases sufficient to evidence the intent and agreement of the parties, are not in all cases allowed as conclusive evidence of a sufficient consideration to support the agreement. Sir Wm. Blackstone observes, that " every bond, from the folemnity of the instrument. and every note, from the fubscription of the drawer, carries with it an internal evidence of a good confideration: courts of justice will therefore support them both, as against the contractor himself, but not to the prejudice of creditors, or strangers to the contract," 2 Bla. Com. 446. The acknowledged learning and general accuracy of the learned commentator give him a peculiar claim to respect; and I cannot but regret the necessity of occasionally pointing out those errors to which his great and comprehensive work must neceffarily be subject; but in the foregoing passage he feems to have laid himself particularly open to observation. He instances a promissory note as an exception to the general rule, which deems contracts without confideration nuda pacta, and refers the exception to the written proof furnished by the note. A promiffory note agreeable to the custom of merchants,

exchange are bound to pay without a confideration, because in commerce we are governed

is by 3 & 4 Anne, c. 9. made negotiable at law; and actions may, by the provisions of that statute, be maintained upon it as upon foreign or inland bills of exchange; and the want of consideration certainly cannot be averred by the maker of the note, if the action be brought by an indorfee; but if the action be brought by the payee, or the note be not within the custom of merchants, Pearson v. Garrett, 4 Mod. 242, the want of consideration is a bar to the plaintiff's recovering upon it, Jefferies v. Austin, 1 Stra. 674. Snelling v. Briggs, at Reading, 1741. Bull. Ni. Pri. 274. See also Gilbert's Lex Prætoria, p. 288, 289. and Bayley's Bills of Exchange, 69.

From this distinction it appears, that the law does not give to promissory notes and bills of exchange the above effect, in respect of the undertaking being evidenced by writing; but in order to strengthen and facilitate that commercial intercourse which is carried on through the medium of fuch fecurities. If, therefore, the exception to the general rule, which requires a confideration as effential to the legal validity of a contract, be bounded by the reasons which govern the above instances, it will follow, that a confideration is by our law necessary to an agreement, though evidenced by writing, unless the writing, from its being of the highest solemnity, import a consideration, or unless it be negotiable at law, and the interests of third persons are involved in its efficacy. It remains laftly to confider what confideration will-be fufficient to fustain an agreement. A consideration, upon which

governed by the law of nations, as they are in other countries, and that law is for

an assumpsit shall be founded, must be for the benefit of the defendant, or to the trouble or prejudice of the plaintiffs, I Comyns's Dig. 149. Confiderations are either executed or executory: a confideration executed will not support a subsequent promise, unless the act was done at the request of the party promising, Dyer, 272. I Roll's Ab. 11. p. 3. 3 Salk. 96. Lampleigh v. Brathwaite, Hob. 105. Bosden v. Thynn, Cro. Jac. 18: Hayes v. Warren, 2 Barnard. 141. Pillans v. Van Mierop, 3 Burr. 1671.; or unless the party promising was under a moral obligation to do the act himself, or to procure it to be done, Church v. Church, cited in Hunt v. Wotton, T. Raym. 259. Anon. cited in Marsh v. Rainsford, 2 Leon. III. Turner v. Watson, Tr. 7 Geo. 3. Buller, Ni. Pri. 147. Trueman v. Fenton, Cowp. 544. 2 Bla. Com. 445. The confideration of the contract must be legal; it must induce a legal obligation. If, therefore, the confideration of any agreement be some act which the law prohibits, Martin v. Blithman, Yelv. 197. or which is against the dictates of morality, or offensive to decency, or prejudicial to the public interests, such agreement will be void: fo if the confideration be the forbearance from some act which the law enjoins, or which good conscience dictates, or public policy requires to be done. A confideration is either express or implied: an express confideration is, where the motive or inducement of the parties to the contract is distinctly declared by the terms of the contract: a confideration is implied, where an act is done or forborne at the request of another, without an express stipulation; in which case the

Book I.

for the encouragement of trade (d): and the reason of this caution in the law, not

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the law prefumes an adequate compensation for the act or forbearance to have been the inducement of the one party, and the undertaking of the other.

- (b) The will of the donor will be fufficient to support a gift, as against himself; for in such a case, stet pro ratione voluntas; but as against creditors or purchasers, that reason will not always prevail. See c. 4. s. 12, 13. See also Jones v. Powell, 1 Eq. Ca. Ab. 84. Lechmore v. E. of Carlisle, 3 P. Wms. 222. Lady Cox's case, 3 P.Wms. 339. Cray v. Rook, Forrest. 153.
- (c) Though before the statute 3 & 4 Anne, c. 9. an action was held not to lie on a promissory note, as within the custom of merchants, Clark v. Martin, 1 Salk. 129. 2 Ld. Raym. 757. Potter v. Pearson, 2 Ld. Raym. 759.; yet a note was held to be good evidence of a debt, Meredith v. Chute, 2 Ld. Raym. 760. The effect of the statute, therefore, is not in making the note evidence of a debt, but in rendering it conclusive evidence between the maker of it and third persons acquiring it by indorsement, though as between the original parties the consideration is still open to discussion, Brown v. Marsh, Gilb. Eq. Rep. 154.
- (d) "The true reason why the acceptance of a bill of exchange shall bind, is not on account of the acceptor's having, or being supposed to have, effects in hand; but for the convenience of trade and commerce, fides

to enforce a naked agreement, was not because serious promises do not of themselves bind in the law of nature (e), but that the ceremony of solemn forms might put men upon consideration, as also to prevent a multiplicity of suits (1). The court therefore will pay that faith and deference to the solemnity of deeds, and to instruments without blemish (2), as to intend them at least the acts of reasonable men, and arising from a good consideration, unless the contrary be proved (f): and in the civil law this exception (g) was not allowed after two years (3).

(1) Plowd. 308. b. See note (4).

(2) Turner v. Binion, Hard. 200. Wright v.Moor, 1 Ch. Rep. 84. 1 Eq.Ca.Ab.84. 2 Bla.Com.446.

(3) Inft, tib. 3.

fides est servanda;" and, indeed, "a nudum pactum does not exist in the usage and law of merchants," Pillens v. Van Mierop, 3 Burr. 1669, 1670. But see Brown v. Marsh, Gilb. Eq. Rep. 154. Hodges v. Steward, 1 Salk. 125.

(e) That naked promises do bind the party promising, by the law of nature, see Grotius, lib. 2. c. 11. Puff. B. 3. c. 5. s. 6. Erskine's Inst. 457.

(f) Though equity will, under certain circumstances, postpone the payment of a voluntary bond or note, &c. yet it will not relieve the party from his obligation, unless he can impeach the transaction by express evidence of fraud; for fraud is never to be presumed.

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(g) The exception of which the party was, by the

civil law, required to take advantage within two years, was de pecunia non numerata; the effect of which was to put the lender on proof of the loan; and unless the exception was taken within the limited time, the loan should be presumed: but such presumption, it seems, might at any distance of time be encountered by express evidence, that the money was not advanced. Vide Perezü Prelectiones, in lib. 4. tit. 30. Cod.

SECTION II.

BUT, regularly, equity is remedial only to those who come in upon an actual consideration: so that, although a voluntary conveyance, which is good in law, is sufficient likewise in equity (1), yet a voluntary desective conveyance, which cannot operate at law, is not helped here in favour of a bare volunteer (b), where there

(1) Beard v. Nuthall, 1 Vern. 427, Wifeman v. Roper, 1 Ch. Rep. 84.

(b) It is certainly generally true, that equity will not be remedial or affiltant to mere volunteers. Colman v. Sorrell, 3 Bro. Rep. 13. Chitty v. Parker, 2 Vez. Jun. 271. There are, however, fome cases, exclusive of those of purchasers, creditors, wise, and children, in which it will interpose; as where "the volunteer claims under a power, the terms of which,

there is no consideration expressed or implied (2). But there is no doubt, that in the case of a purchaser, the want of a surrender of a copyhold, or the like, shall be supplied (3). And so in case of a creditor (i), or provision for payment of debts (4). And there having been pre-

(2) Bonham v. Newcomb, 2 Ventr. 365. Longdale v. Longdale, 1 Vern. 456. Pickering v. Kealing, 1 Ch. Rep. 78. 2 Freem. 65. Greenwood v. Greenwood, Ch. Rep. 272. See c. 1. f. 7.

(3) Bokenham v. Bokenham, 1 Ch. Ca. 240. Greenwood v. Hare, 1 Ch. Rep. 144. Barker v. Hill, 2 Ch. Rep. 113. Thompson v. Arfield, 2 Ch. Rep. 112. Taylor v. Wheeler, 2 Vern. 565. Jennings v. Moore, 2 Vern. 609. Bradiy v. Bradly, 2 Vern 163. (4) Drake v. Robinton, 1 P. Wms. 444. Harris v. Ingledew, 3 P. Wms. 91. Hastewood v. Pope, 3 P. Wms. 322.

by accident, become impossible to be executed; for a court of equity relieves against all manner of accidents, fince it is unconfcionable for the remainder-man to take advantage of them: therefore, if a man make a conveyance, with a power of revocation, in the prefence of four privy counfellors, and he is fent by the king to Jamaica, where that circumstance becomes imposfible, there equity will allow him to revoke without it," Bath and Montague's case, 3 Ch. Ca. 68. So where the remainder-man gets the deed into his poffession, and will not allow the tenant for life to have a fight of it, there tenant for life may execute conveyances; and though he does not purfue the terms of the power, yet equity will relieve, because the remainder-man shall not take advantage of his own wrong, by with-holding from the tenant for life the fight of his power, Gilb. Lex Prætoria, 306. In what cases equity will marshall assets in favour of volunteers (as legatecs) will be confidered hereafter.

(i) See p. 34. note (s), where the circumstances which qualify this general rule are particularly stated, and the leading cases referred to.

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(5) Hardham v. Roberts, 1 Vem. 132. Smith v. Afhton, 1 Ch. Ca. 263. 2 Freem. 115. Goodwyn v. Goodwyn, 1 Vez. 226.

cedents already of relief, where it is a provision for children (5), it is best to make the rule uniform, and to flick to a rule; and there ought not to be one fort of equity for an eldest, and another for a younger fon (k). Byas v. Byas, 2Vez. 164. Tudor v. Anson, 2Vez. 582. See c. 1. f. 7. note (s).

> (k) It was formerly thought that the principle upon which courts of equity supply the want of a surrender, in the case of children, extended to grand-children. See Watts v. Bullas, I P.Wms. 60. Freestone v. Rent. T. 1712. there stated in a note. Furfaker v. Robinfon, Pre. Ch. 475. But this opinion was controverted by Lord Hardwicke, in Goring v. Nash, 3 Atk. 189. and referred to the mistaken notion, that whatever confideration was fufficient to raise an use at law, was within the principle of this branch of equitable jurif-

diction. See also Tudor v. Anson, 2Vez. 582.

SECTION III.

A ND in equity there must not only be a confideration, as a motive for relief, but it must be a stronger consideration

ation than there is on the other fide (1); for if it was only equal, then the balance would incline neither way, but matters must be left in the same situation as they are in at prefent (1): and therefore where it is faid that Chancery will help a defective affurance, if intended as a provision for younger children, this is always to be understood where the heir has some provision made for him (m); for the proportion is to be left to the prudence of the father, and equity will then supply the circumstantial part in support of the father's providence for the welfare of his family, which he is by nature bound to take care of (2). But where he is desti-

(1) See c. 4. f. 25. Robertion, v. St. John, Ch. 16 Dec. 1786. MSS. Lord Compton v. Oxendon. 2 Vez Jun. 261. Chitty v. Parker 2 Vez. Jun. 271.

6 Vin. Ab. 57. pl. 24. Cook v. Arnham, 3 P. Wms. 283. Forrest. 35. vey, 1 Atk. 561. Baker v. Jennings, 2 Freem: 234.

(2) Weeks v. Gore, M. 4 G. Harvey v. Har-

- (1) If, therefore, the agreement be unreasonable, equity will not interpose. See c. 4. s. 26. See also Stanhope v. Topp, 2 Bro. P.C. 183. 2 Eq. Ca. Ab. 55. note to case 1. Grounds and Rudiments of Law and Equity, p. 18.
- (m) If the heir has such provision it is not material whence he derives it. Pike v. White, 3 Bro. Rep. 286. It has already been observed, that the heir, whose claim is to be thus respected, must be one for whom the testator was under as strong a moral obligation to provide, as for the devise, Chapman v. Gibson, 3 Bro. Ch. Rep. 229.

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(3) Hicken v. Hicken, M. Vac. 1733. 6 Vin. Ab. 59. pl. 20.

(4) Cooper v. Cooper,

2Vern. 265.

(5)See c.4. f.25.

tute of all provision, there the reason is changed more strongly on the other side, that the court of equity should not interpose to deprive him of the advantage which he has at law (3). And so if one devises his copyhold, being borough English, to his eldest son, and devises houses to his younger fon, and the houses are foon after burned, and are never entered upon by the younger, the court, as this case is circumstanced, will not supply the want of a furrender (4). And although against a stranger, who comes in with notice, or without a confideration, equity may fupply the want of a legal conveyance; yet it never will against him who is a purchaser for a valuable consideration without notice (n); for when both are in equal equity, the legal title takes place (5).

(n) It appears from the decree in Burgh v. Burgh, Finch's Rep. 28. that a defective conveyance may be fupplied in equity in favour of a mortgagee, though the heir of the mortgagor had, between the time of the conveyance and its defects being supplied, confeffed divers judgments, which judgments the court held, should not affect the estate to the prejudice of the mortgagee. See p. 34.

SECTION IV.

A S to the effect of covenants, therefore, to pass with the lands, when the asfignee is a purchaser for a valuable confideration without notice, equity will follow the law; as in case of a lease of a fair or wine-licence for years, rendering rent, &c. a purchaser shall not be charged with the rent; because personal things are not in the law intended to reach the affignee (1). So mere collateral covenants, which do not touch or concern the thing demifed in any fort, bind only the covenantor, and his executors or administrators (2) who represent him (o). But covenants that run with the land, that is, which extend to fomething in effe, parcel of the demife, and affect the estate, lie between all those

(1) James v.
Blunck,
Hard. 88.
Bp. of Sarum
v. Hofworthy,
2 Ch. Rep. 32.
(2) Spencer's
cafe, 5 Co. 16.
Bachelory Gage
SirWm. Jones,
223. Cro. Car

(a) The executors and administrators of the covenantor will be bound by the covenant, though not named, unless the covenant be of such a nature as not to allow of its being performed by any other person but the covenantor. See Dyer, 14. pl. 69. I Roll's Ab. 519. 1. 35. Hyde v. Dean and Canons of Windfor, Cro. Eliz. 553. That an executor may dispose of a lease, notwithstanding testator's covenant not to alien, see Seers v. Hind, IVez. Jun. 294.

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who are privy in tenure or contract, though not named (p), like debt for rent at common law; and the reason is, because usually the rent is more or less accordingly, et qui sentit commodum sentire debet

(p) All persons to whom the land descended were, by the common law, entitled to the benefit of covenants which run with the land; but grantees of the The flat. 32 H. 8. c. 34. therereversion were not. fore enacted, That all grantees, &c. of reversions should have the like advantages against the lesses, their executors, &c. by entry for non-payment of the rent, or for doing waste, or other forfeiture; and the fame remedy by action only, for not performing other conditions, covenants, or agreements contained in the leafes, against the lessees, as the lessors or grantors The statute also gives the lessees the same remedy against the grantees of the reversion, which they might have had against their grantors. It must not, however, be understood from the general words of the statute, that the grantee of the reversion can take benefit of every forfeiture by force of a condition, Lord Coke conceiving the operation of the statute to be confined to fuch conditions as are either incident to the reversion, as rent; or for the benefit of the state, as for not doing of waste, for keeping the houses in repair, for making of fences, or fuch like; and not for the payment of any fum in grofs, delivery of corn, wood, or the like. See Co. Litt. 215. where a variety of resolutions upon this statute are stated, and the authorities referred to. See also 6 Vin. Ab. Covenant, (K. 3) p. 397. Webb v. Ruffell, 3 Term Rep. 393.

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et onus (3). So a collateral covenant to be done upon the land, as to build de novo, shall bind the assignee (q) by express words (r), because he is to have the benefit (3) Spencer's cafe, 5 Co. 16. b. 5 Co. 24. 1 Roll's Ab. 521. Tatem v. Chaplin, 2 H. Bia. Rep. 133.

- (q) This liability of the affignee does not extend to covenants broken before the affignment; as a covenant to build within a certain time, which was past before the affignment, Grescott v. Green, 1 Salk. 199. St. Saviour's, Southwark, v. Smith, 3 Burr. 1271. 1 Bla. Rep. 351. Nor is the affignee to be affected by any covenant broken after he has affigned over, Boulton v. Canon, 1 Freem. 336.
- (r) In the case put, the affignees are bound by the terms of the covenant, for unless named they would not be bound by law; "for the covenant concerns a thing which was not in effe at the time of the demife made, but to be newly built after, and therefore shall bind the covenantor, his executors, administrators, and not the affignee; for the law will not annex the covenant to a thing which hath no being," Spencer's case, 5 Co. 16. b. But as the law would sustain such a covenant against the covenantor and his assigns, if expreisly included in the covenant, and give damages for its non-performance, it should seem to follow, that the covenantee would be intitled in equity to a decree for the specific performance of such covenant to build; and of this opinion Lord Hardwicke appears to have been, in the case of the City of London v. Nash, 3 Atk. 515. IVez. 12. see also Pym v. Blackburne, 3Vez. Jun. 34. But in the case of Lucas v. Commerford, 3 Bro. Ch. Rep. 166. Lord Thurlow C. held, "that there could not be a decree to rebuild Aa2

(4) Moor, 159. Spencer's calc, 16. b. benefit of it (4); and a covenant to renew, in confideration of improvements, a purchaser of the inheritance shall make good (5).

(5) Richardson v. Sydenham, 2Vern. 447. Ab. 47.

. Tanner v. Florence, 1 Ch. Ca. 259. Finch v. E. of Salifbury, 1 Eq. Ca.

in pursuance of a covenant, for that he could no more undertake the conduct of a rebuilding than of a repair." See also Virgin v. Mosely, 3Vez. 184.

SECTION V.

BUT in case of covenants that run with the land, if the circumstances are hard, equity will not decree them in specie, even against those who are bound by them at law; and therefore, although it is the mortgagee's own folly to take an assignment of the whole term, whereby to subject himself to the covenants in the original lease, and not to take a derivative lease of all the term, but a month, or a week, or a day, as he might have done (s); yet

⁽s) Though a derivative leffee or under-tenant is liable

yet where he is only a mortgagee who never was in possession (t), the Chancery will not assist to charge him, but leave the lessor to recover at law, as well as he can (1). But if the lessor recovers at law (u), the rent reserved on the lease, against

(1) Sparkes v. Snith, 2Vern. 275.

to be distrained for rent during his possession, he is not liable to be sued on the covenants of the lease, there being no privity of contract between him and the lessor, Holford v. Hatch, Doug. Rep. 174. See note (d).

- (t) It might be inferred, from the report of Sparkes v. Smith, 2Vern. 275. that a mortgagee of a leafe was, before he took possession, liable at law to the covenants of the leafe. It was, however, fettled in the case of Eaton v. Jaques, Doug. Rep. 438. that if a term be affigned by way of mortgage, with a clause of redemption, the leffor cannot fue the mortgagee as assignee of all the estate, &c. of the mortgagor, even after the mortgage had been forfeited, unless the mortgagee has taken actual possession; but it is not necessary that a lessee for lives or years should have taken actual possession, in order to intitle the lessor to his action for rent; for in such case the rent is due by the contract, and not in respect of the occupation, which it is in the case of a tenancy at will, Bellasis v. Burbrick, I Salk. 200. See also I Ventr. 41. 1 Sid. 423.
- (u) In Eaton v. Jaques, Lord Mansfield observed, that the case referred to, Pilkington v. Shaller, was not to be supported; "for the court resused to relieve

(2) Pilkington v. Shaller, 2Vern. 374. against one as assignee, who had never entered, equity will not deprive him of this advantage at law (2): and in some cases equity will give the lessor a remedy where he had none at law; as if lessee for years makes an under-lease in trust for J. S., the lessor may compel J. S., in equity, to repair (x): but this is only where the executors of the first lessee are insolvent; for though the privity of estate is destroyed in law, yet he shall not have recourse to this remedy, whilst he has any lest against the executors of the first lessee (3).

(3) Goddart v. Keate, 1 Vern. 87.

the mortgagee, because it was his own fault to take an affignment of the whole term, and not an under-lease; but that is a very common ground of relief in equity." His Lordship did not, however, mention any case in which equity had relieved upon such ground.

(x) In the case of the City of London v. Nash, 3 Atk. 515., Lord Hardwicke held, that the court would not enforce a covenant to repair; the rule laid down in Goddart v. Keate, must therefore be referred to the lessor having no legal, or at least effective means to enforce the covenant at law; the tenant in possession not being bound by it, he being an under-tenant, and the lessee being insolvent.

SECTION VI.

So in case of a fraud, equity will extend their relief in savour of the lessor; and therefore, although regularly this court will only decree an assignee of a lease to pay the rent become due since the assignment, and which shall become due while he continues in possession, but not during the continuance of the lease (1); for he may, if he can, get rid of the lease by assigning it to another (y): yet there

(1) City of London v. Richmond, 2 Vern. 421. Pre. Ch. 156.
Treacle v. Coke, 1 Vern. 165.

(y) At law the affignee is liable only for the rent actually incurred, or covenants broken during his poffession, Boulton v. Canon, I Freem. 336. therefore, he affign the very day before the rent becomes due, the leffor cannot maintain his action for it, Tovey v. Pitcher, Carth. 177. 4 Mod. 71. 3 Co. 22. I Salk. 81. I Freem. 326. Nor will the circumstance of such assignment being per fraudem, as to a beggar, alter the case, Lereux v. Nash, Stra. 1221. Buller's Ni. Pri. 159. Taylor v. Shum, Bosanquet's Rep. C. P. 21. But see Knight v. Freeman, I Vent. 329. 331. T. Raym. 303. T. Jones, 109. in which the validity of such affignment was denied. But whatever may be the rule of law upon this point, it feems to be now fettled, that courts of equity will compel an affignee of a term to account for the rent the whole time he enjoyed the land, Treacle v. Coke, I Vern. 165. Whether equity will, in order to secure

is this difference taken, if the affignees have continued long in possession, and the premises

the future rents under any circumstances, restrain an affignee from affigning to a beggar or infolvent person, was confidered, but not determined, in the case of Philpot v. Hoare, 2 Atk. 319. If the affignee offer to give up the poffession to the leffor on reasonable terms, and the leffor refuse to accept such surrender, it were clearly too much for a court of equity, in restriction of a legal right, to prevent the affignment, Vaillant v. Dodomede, 2 Atk. 546. But supposing the lessor to be willing to accept of a furrender of the term, and the affignee wantonly to infift on his legal right to affign, when and to whom he pleafed, it feems that, under certain circumstances, a court of conscience might without impropriety interpose, to prevent the abuse of such right; and this Lord Hardwicke appears to admit, in Vaillant v. Dodomede; for having stated the legal right and the propriety of courts of equity in general, following the rule of law, he observes, "but it is true in some fort of affignments, made by tenants, the court has interpoled;" nor does the difficulty reported to have occurred to Lord Hardwicke, in Philpot v. Hoare, appear upon examination to have been intitled to much effect. His Lordship is reported to have faid, "As to the accruing rents, it is a point of more difficulty; for the covenant in this leafe not to affign, does not run with the land to the affignce, because affignces are not bound by name in the covenant." Whence it might be inferred, that if affigns had been expressly included in the covenant, his Lordship would have considered them bound by the covenant. But whether affignees premises are worsted, and become ruinous under their hands, or by their means, there the affignment to a beggar would be considered to be a fraud to get rid of the damage, which they ought to answer. But if they assign immediately after their coming into possession, there is no ground

be bound or not by a covenant, does not (except in the case of a collateral covenant to be done upon the land) depend upon their being named in the covenant; for if the covenant run with the land, affignees are bound, whether named or not; and if the covenant do not run with the land, but is a personal contract, or respect something to be done, purely collateral to, and not on the land, they are not bound, though they be expressly named. See Spencer's case, 5 Co. 16. b. 17. a. Therefore, whether the affignee was named or not, was immaterial to the question, Whether the affignee was bound by the covenant not to affign without confent of the leffor? Nor does it ffrike me as having been necessary, in order to determine whether a court of equity flould reftrain an affignment to a beggar, previously to determine, whether the affignee was bound by the covenant not to affign; for supposing the affignee to be bound at law by the covenant, equity may restrain the wanton and fraudulent breach of a covenant; and supposing him not to be bound, yet he may be affected in conscience upon the fame principle, that the affignee of a merely personal covenant may be affected in conscience, though not bound at law. See City of London v. Richmond, 2 Vern. 421.

(2) Gilbert's Lex Prætoria, 296.

(3) Goddart v, Keate, 1 Vern. 87, 88.

(4) Walker's cafe, 3 Co. 22. Overton v. Sydall, Poph. 120.

to relieve (z), because the assignee was not chargeable at law, and the leffor had his original fecurity against the lessee and his executors unimpeached (2). But where a man makes a leafe, rendering rent, if the leffee affigns to a beggar or infolvent person, in equity the leffee shall be bound to pay the rent, which is a common case (3); and even at law the first lessee, by his express contract, may be charged in debt (a) for rent after affignment (4). And for the same reason it is, that in debt for rent upon a leafe for years, the plaintiff need not fet forth any entry or occupation; as upon a leafe or contract, and

- (z) This difference is stated by Lord Chief Baron Gilbert, in his Lex Prætoria; but the cases upon which it is sounded are not referred to.
- (a) Provided the lessor has not accepted the assignee for his tenant; for after the lessor has accepted the assignee, he cannot maintain debt against the lessee, though if the covenant be express, he may maintain an action of covenant, Thursby v. Plant, 1 Sid. 402. 447. 1 Sand. 237. Marsh v. Brace, Cro. Jac. 334. Bachelor v. Gage, Cro. Car. 188. Boulton v. Canon, 1 Freem. 336. Brett v. Cumberland, Cro. Jac. 522. Barnard v. Godscall, Cro. Jac. 309. Wadham v. Marlow, MSS. B. R. 16 Nov. 1784. But if the covenant be merely implied by law, his acceptance of the assignee.

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and not by the occupation, as in the other case (5).

(5) Bellasis v. Burbick,

1 Salk, 209. '1 Ventr. 41. See fec, 6. note (b).

for his tenant leaves him without remedy against the lesse. See 1 Sid. 447. Brett v. Cumberland, Cro. Jac. 523.

SECTION VII.

BUT there is a difference between covenants, advowsons, common, and the like, annexed to the possession of the land, and which pass with the land, and an use (b) or warranty (c), or

(b) The distinction here referred to is thus stated in Chudleigh's case, I Co. 121. "An use is a trust or confidence which is not issuing out of land, but is a thing collateral annexed in privity to the estate, and to the person, touching the land, scil.; that cessuy que use shall take the profits and that the tertenant shall make estates according to his direction: so that he who hath an use, hath neque jus in re neque ad rem, but only a considence and trust, for which he hath no remedy by the common law; but his remedy was only by subpæna in Chancery. If the seoffees would

or fuch like things, annexed to the estate of the land in privity: for to all uses there

not perform the order of the Chancery, then their persons, for the breach of the confidence, were to be imprisoned till they did perform it; and therefore the case of an use is not like unto commons, rents, conditions, &c. which are hereditaments in judgment of law, and which cannot be taken away or discontinued by the alienation of the tertenant, or by diffeifin, or by escheat, as uses may." From this it follows, that the feoffee to uses having the legal estate, and the cestuy que use having a mere equitable interest in it, bona fide conveyances by the feoffee would, before the statute of uses, bind the land in the same manner as a trust estate is now discharged of the trust by the truftee conveying it to a purchaser for valuable confideration, and without notice of the trust; for by fuch conveyance the purchaser acquires an equal equity with that of the ceftuy que trust, and having an equal equity, the law must prevail, Millard's case, 2 Freem. 43. But this reason only extending to bona fide purchasers of the trust estate, all other persons claiming by or from the feoffee or truftee. will be charged with the use or trust in respect of the privity of estate and confidence, which may be implied, either from notice of the use or trust, or from a want of confideration. See Law of Uses, 177. Lord Bacon's Readings on the Statute of Uses, Sander's Law of Uses and Trusts; see also B. 2. c. 1. where this subject will be more fully investigated.

⁽c) A warranty (with reference to land) being a real covenant annexed to the freehold, by which the grantor

there must be confidence in the person, and privity of estate either expressed or im-

grantor of an estate doth, for himself and his heirs, warrant and secure the grantee the estate so granted, (2 Bla. Com. 300. Shepherd's Touchstone, 181.) it might be inferred, that the covenant is binding on all persons claiming under the grantor, and that the benefit of it extended to all persons claiming under the grantee. I will therefore briefly state, first, who are bound by a warranty; and, secondly, who may and how take advantage of it.

Ist, If the grantor be tenant in fee-simple, and the warranty be express, it will of course bind his heir, if he be expressly named: otherwise not, unless the warranty be implied by law, as in case of exchange and partition; and if the grantee be evicted he will be intitled to a recompence from the heir, when bound, if real affets have descended to him. If the grantor be tenant in tail, the iffue, by construction of the statute de donis, will not be barred by the warranty descending, unless they have real affets; but if they have real affets, then, to prevent circuity of action, they will be barred: with respect to a remainder-man, he will be barred by the warranty descending on him, whether he have affets or not. If the grantor be tenant by the curtefy, his warranty, either in the life of his wife, or afterwards, is declared by the statute of Gloucester, 6 Ed. I. c. 3. not to be a bar to the heir, unless affets defcend to him from the warrantor; and by 11 H.7. c. 20. the warranty of the wife of her husband's eftate is declared to be void; as are, by 4 Ann. c. 16.

implied; and the implied confidence is, where a man comes in with notice, or without

f. 21. the warranty of tenant for life, and all collateral warranties of any anoreftor who has not an estate of inheritance in possession. See Co. Litt. 384. and Mr. Butler's Notes, Co. Litt. p. 365. 370. 373. in which the doctrine of warranty is considered with great learning and perspicuity.

2dly, "All those that are parties to the warranty, i. e. fuch as are named in the deed regularly, shall take advantage of the warranty; as if one doth warrant land to another, his heirs and affigns; in this case, both the heirs and affigns may take advantage of it, and they both may vouch or rebut, or have a warrantia chartæ, fo as they come in in privity of estate; for otherwife the heirs and affigns cannot vouch or have a warrantia chartæ, and yet they may in divers cases rebut. But those that are not named, for the most part, shall not take advantage of the warranty; and therefore, if land be warranted to I. S. and not to him and his heirs, or to him and his affigns, or to him, his heirs, and affigns; in these cases neither the heir nor the affignee may vouch or have a warrantia chartæ; and yet, in some cases where it is so, the assignee or tenant of the land may rebut," Shepherd's Touchstone, 198. "And although no man shall vouch or have a warrantia chartæ, either as party, heir, or assignce, but in privity of estate, yet any that is in of another estate, be it by disseifin, abatement, intrusion, usurpation, or otherwise, shall rebut by force of the warranty, as a thing annexed to the land," Co. Litt. 385. a. To enumerate the various diffinctions

I.

without a confideration (1). And even a fpecial covenant to fettle lands binds the conscience only, and not the land (d); yet a general covenant will bind as strongly (e). And if it appear judicially to the

(1) Law of
Uies, 178, 179.
Lord Bacon's
Readings on
the Statute of
Ufes.
Shepherd's
Touchitone,
502.

distinctions which prevail upon the subject of warranty, would lead to a much wider field of discussion than the purpose of this note requires, which is merely to shew, that though warranty be a real covenant, it does not involve all those consequences which are incident to covenants which run with the land, and therefore does not afford, in all cases, an equally binding, and extensively operating consideration.

- (d) A covenant to fettle or convey particular lands, will not at law create a lien upon the lands; but in equity such a covenant, if for a valuable consideration, will be deemed a specific lien on the lands, and decreed against all persons claiming under the covenantor, except purchasers for valuable consideration, and without notice of such covenant, Finch v. Earl of Winchelsea, I P. Wms. 282. Freemoult v. Dedire, I P. Wms. 429. Jackson v. Jackson, 4 Bro. Ch. Rep. 462. Coventry v. Coventry; best reported at the end of Francis's Maxims; for equity considers that as done, which being distinctly agreed to be done, ought to have been done, Grounds and Rudiments of Law and Equity, p. 75.
- (e) A general covenant to fettle lands of a certain value, without mentioning any lands in particular, will not create a specific lien on any of the lands of the

(2) Coventry v. Coventry, Francis's Maxims, Stra. 596. 2 P.Wms. 223. Gilb. Rep. 160.

court, that he could not properly perform or make election; as if the time of fettlement were past, and he aged, or the like; the court may apply the general covenant on his particular lands, and chuse for him (2). So where A. on the marriage of his fon, covenants for himself, his executors and administrators, (without naming his heirs,) within one month after the marriage, to fettle lands of 150l. per ann, on the fon and the iffue of the marriage, but dies before any fettlement made, the fon enters upon the real estate as heir to the father, and fettles it for the jointure of a fecond wife, who has no notice of the articles: the articles shall be a lien on the lands whereof the father was then feized, though no particular lands were mentioned in the articles, unless he had purchased and settled other lands within the time limited by the articles, and which were not fettled on the fecond wife, who came in as a purchaser without notice (3). So if a man covenants or enters into bond

(3) Roundell v. Breary. 2 Vern. 482.

the covenantor, and therefore cannot be specifically decreed in equity, Freemoult v. Dedire, I. P. Wms. 430. But if the covenantor expressly declare the set-tlement

bond to fettle land of fuch a value, or an annuity out of land of fuch a value (f), and has no land at the time of the fettlement, but afterwards purchases land, that land shall be liable, and that against a voluntary devise (4).

(4) Took v. Hastings, 2 Vern. 97.

tlement to be in execution of his power, though the particular lands to be charged be not specified, equity will ascertain them, Coventry v. Coventry, Francis's Maxims, Gilb. Rep. 160.

(f) If, in pursuance of such a covenant not specifying any particular lands, the covenantor convey certain lands, which afterwards prove to be of less value than covenanted, equity will not supply the difference of value out of other lands. See Countess of Downe v. Moreton, 2 Ch. Ca. 69. Vernon v. Vernon, Amb. 5. But if tenant for life, with power to settle a jointure not exceeding 12001. per ann. on his marriage, covenant to settle on his intended wise 10001. and sends for his steward to be informed of a part of his lands to that value, and settles according to the particular, and the lands so settled afterwards appear to be of the value of only 3001. equity will decree the issue or remainderman to make up the 10001. per ann. by other lands, Lady Clifford v. Burlington, 2 Vern. 379.

SECTION VIII.

(1) See f. 1. note (a), Heineccius Elem. J. N. & J. G. c. 13. f. 353. 361. AND as a covenant without a confideration is null (1), it is the same thing, if the cause or consideration happen to cease (g); so that in all reciprocal contracts

(g) If the cause or consideration of an agreement fail, before it be mutually performed, equity will not, in general, decree the performance of fuch agreement; as if the agreement be to convey the manor and lands in A. and the vendor appears to have no title to the manor, or is evicted of the lands, equity will not compel the vendee to complete his purchase; for as a purchaser in equity shall not be compelled to accept even a doubtful title, a fortiori, he shall not be compelled to take a confessedly defective title, Sir G. Hanger v. Eyles, 21 Vin. Ab. 540. pl. 1. Hicks v. Philips, Pre. Ch. 575. Tourville v. Nash, 3 P. Wms. 306. Stent v. Baillis, 2 P. Wms. 220. See c. 3. f. 9. note (i). But if the nature of the confideration involve a contingency which may happen before the agreement is mutually executed, equity will enforce performance of the agreement, though fuch contingency should so happen; as where the agreement respect an interest determinable on lives, and one or more, or even all of the lives, fall before the purchase-money is paid, equity will, notwithstanding, decree payment of the purchasemoney; for the nature of the contract involving fuch contingency, the terms of it must be supposed to have been governed or influenced by the uncertainty of the time when it might happen, Cass v. Rudele, 2 Vern.

tracts there is a warranty on both fides in equity, though not at law (b). But a difference

280. White v. Nutt, I P. Wms. 61. Ex parte Manning, 2 P. Wms. 410. Mortimer v. Capper, 1 Bro. Ch. Rep. 156. Henley v. Acton, 2 Bro Ch. Rep. 17. Jackson v. Lever, E. 1792. See also c. 2. s. 11. note (i). Neither will equity relieve from the performance of an agreement, which, when entered into, was founded on a mutual confideration, though by the death of one of the parties the confideration on his part should fail; as where money was devised to be laid out in land to the use of B. in tail, remainder to the use of C. in fee; B. having no iffue, agreed with C. to divide the money, and before the agreement was executed, B. died, by which C. becoming intitled to the whole fund, refused to complete the agreement; but the personal representative of B. filing his bill for the performance of the agreement, it was decreed, first, by the Master of the Rolls, and afterwards, upon an appeal, by the Lord Chancellor, upon the ground that the death of B. had not rendered the agreement less capable of being executed, Carter v. Carter, Forrest. 271. So in the case of articles to make partition between joint-tenants, if they amount in equity to a feverance of the jointenancy, they will be enforced against the survivor, Hinton v. Hinton, 2 Vez. 634. See also Brown v. Raindle, 3 Vez. 257.

With respect to the failure of the consideration, after the agreement is executed, there are some cases in which relief may be had at law; as where the premium paid for an insurance may be recovered back, the risk having never been incurred, see Parke's In-Bb 2 furance.

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ference has been taken between a bargain for a place, where the party may be removed

furance, p. 418.; or the confideration money for an annuity is void for want of registration, Shove v. Webb, 1 T. Rep. 732. and there certainly are many other cases in which courts of equity appear to have recognized the failure of the confideration as the subject of relief. These decisions are however opposed by others of equal weight and authority: fo that it feems extremely difficult, if not impracticable, to extract from the books what the rule of equity is upon this point. In Newton v. Rouse, I Vern. 460. the court decreed one hundred guineas, part of an apprentice-fee, to be paid back to the father of the apprentice, his master having died within three weeks after the fealing of the articles, though it was expressly provided by the articles, that if the master should die within the year, only fixty pounds should be returned. This decision, the Master of the Rolls (Lord Kenyon) in Hale v. Webb, 2 Bro. Ch. Rep. 80. observed, "carried the jurisdiction as far as could be;" and if it be a rule of equity, as in many cases it is stated to be, that equity will not alter nor extend the agreement of the parties, the decree feems irreconcilable with fuch rule. Thurman v. Abel, 2Vern. 64. the decision is referable to a different principle. See Hale v. Webb; fee also Calland v. Troward, 2 H. Bla. 324.

By an anonymous case, 2 Ch. Ca. 19. Finch Lord Ch. appears to have relieved from the payment of the purchase-money, the land being evicted, though the vendor had covenanted only for himself and all claiming under him, and the eviction was, by one claiming by a title paramount the vendor's. To the report

moved at pleasure, and a bargain of land of a defeasible title: yet seeing the king has

of that case, the following notes are annexed:—1st, If declaration, at the time of the purchase treated on, that there was an agreement to extend against all incumbrances not only fpecial, it could not have been admitted. 2dly, The affirmative covenant is negative to what is not affirmed, and all one as if expressly declared, that the vendor was not to warrant but against himself, and the vendee to pay, because the security was absolute without condition. 3dly, Quære, If this may not be made use of to a general inconvenience, if the vendee, having all the writings and purchase, is weary of the bargain, or in other respects fets up a title to a stranger by collusion." The objections above stated appear intitled to considerable attention; and it is further observable, that if the express and limited warranty of the vendor can be extended, fo as to relieve the vendee from payment of the purchase-money, in respect of an eviction to which the warranty does not extend, it might be inferred, that if the purchase-money had been paid, the vendee would be intitled to recover it back; a confequence which would lead to the most ferious inconvenience, as every contract, however guarded and bounded in its terms, would be liable to be opened at any distance This confideration, probably, influenced the decision of the case of Bree v. Holbech, Doug. 655. in which the Court of King's Bench held, that an action for money had and received, would not lie to recover back a fum of money paid in confideration of an affignment of a mortgage, which afterwards turned out to be a forgery; the affignor " not having covenanted

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has not disallowed such bargains, as it were to be wished he would, they occasioning

nanted for the goodness of the title, but only that neither he nor his testator had incumbered the estate; and it being incumbent on the affignee to look to the goodness of it." This decision is an express authority, that the purchase-money paid cannot be recovered back at law, unless the express covenant for title, &c. be broken; and if it be true, that an action for money had and received will lie in all cases in which a bill in equity could be fustained, (see Moses v. Macfarlane, 2 Burr. 1005) it feems to afford this conclusion, that a bill in equity, in fuch case, could not have been fustained. See Duckenfield v. Whichcott, 2 Ch. Ca. 204. If the vendor appear to have known of the defect of the title, or of an incumbrance, and to have concealed it, then indeed the purchase-money, or an equivalent to the incumbrance, may be recovered back, either at law or in equity, though the warranty be confined to acts done by the vendor; but the circumstance of a court of equity requiring the vendor in fuch case to be affected with fuch fraudulent concealment, raises a strong prefumption that, without proof of it, the purchaser could not have been relieved; and in the case of Harding v. Nelthorpe, Nels. Ch. Rep. 118. fuch proof was required, and for fuch purpose an issue was directed, to afcertain whether the vendor did or did not know of the incumbrance which affected the land, but to which his covenant did not extend; but fee Urmstone v. Pate, Nov. 1794. Ch.

It remains to confider, whether the destruction of the thing demised will in equity intitle the lessee to a suspension of the rent. In confidering this point, it is material fioning deceit to the king, &c. the purchaser shall not lose his money (2); and therefore

(2) Conyets v. Hammond, 2 Ch. Ca. 83.

material to refer to the legal distinction between covenants implied by law, and those obligations which are founded on the express covenant of the party: where the obligation is created by law, if the party is disabled from performing it without any default in him, and hath no remedy, the law will excuse him; as in the case of waste, if a house be destroyed by tempest, or by enemies, the leifee is excused. But when the party, by his own contract, creates a duty or charge upon himself, he is bound to make it good if he can, notwithstanding any accident by inevitable necessity, because he might have provided against such liability by his contract: and therefore, if the leffee covenant to repair a house, though it be burnt by lightning, or destroyed by the king's enemies; yet the lessee is bound to repair it, Dyer, 33. a.; fo if burnt by accident, Charterfield v. Bolton, Comyns's Rep. 627. Bullock v. Dormer, 6 T. Rep. 650. 751. Upon this distinction it was resolved, in Paradine v. Jane, Aleyn's Rep. 26. that a leffee could not be released from his covenant to pay rent, though he had been driven from the premifes by the king's enemies; and in Monk v. Cooper, 2 Ld. Raym. 1477. 2 Stra. 763. the leffee was held liable to the rent referved, though the premifes were burnt down, and the leffee's covenant was, to keep the demised premises during the term, except they should happen to be demolished or damaged by The fame point was also determined in Belfour v. Weston, I Term Rep. 310. and in Ainsley v. Rutter, there cited; and was recognized as law by the Court of King's Bench, in Doe v. Sandham, I Term Rep.

therefore what the feller has received, he fhall repay (i). So if in a fale of goods, the

710. These authorities, to which others might be added, are sufficient to shew that the law does not discharge the lessee from the payment of rent expressly reserved, though the premises, in respect of the enjoyment of which it be reserved, be destroyed by fire, or demolished by the king's enemies, &c. The lessee being thus without remedy at law, it is next to be considered whether he be relievable in equity.

In Carter v. Cummins, cited in Harrison v. Lord North, 1 Ch. Ca. 83. " the leffee of a wharf, which was carried away by an extraordinary flood, instituted a fuit in equity, to be relieved against payment of his rent; but the only relief he had was against the penalty of the bond, which was broken for non-payment of the rent, and the defendant ordered to bring only debt for his rent." In Harrison v. Lord North, the Lord Chancellor, though he expressed his inclination to relieve the plaintiff against the payment of rent for a house, which during the troubles had been used by the parliament as an hospital for foldiers, does not appear to have given any relief. The report merely states, that his Lordship took time to advise, and declared, that if he could, he would relieve the plaintiffs; but in that case it is observable, that the lessee had offered to surrender the lease to the lessor, which the lessor refused. From that period the point feems not to have been difcuffed in equity, until it occurred in Brown v. Quilter, Ambler's Rep. 619. and that case going off upon another ground, the point was not then determined. Lord Northington C. did, however, express himself

the buyer pays money in part of fatisfaction, and afterwards the whole value of

in terms too distinct to allow of any doubt respecting his opinion upon the subject. "The justice of the case," his Lordship observed, " is so clear, that a man should not pay rent for what he cannot enjoy, and that occasioned by an accident which he did not undertake to fland to, that I am much surprized that it should be looked upon as fo clear a thing that there should be no defence to fuch an action at law, and that fuch a case as this should not be considered as much an eviction, as if it had been an eviction of title; for the destruction of the house is the destruction of the thing. Though this covenant does not extend to oblige the defendant to re-build, yet, when an action is brought for rent after the house is burnt down, there is a good ground in equity for an injunction till the house is rebuilt."

The next case in which this point occurred was, Steele v. Wright, before Lord Apsley, 1773. The decision is stated, in Doe v. Sandham, I Term Rep. 708. to have been, "that though the landlord is not bound to rebuild, yet the tenant is neither obliged to rebuild, nor to pay rent till the premises are rebuilt." This decision is an express authority in favour of the lessee; and as it admits that the lessor was not bound to rebuild, it seems to surnish a general conclusion: but it may be material to consider, whether such conclusion be reconcilable with principle. I have had occasion to observe, that courts of equity do not assume the right of controlling the rule of law, where the rule of law embraces all the circumstances of the case;

of the goods is recovered against him at law; the money so paid upon that account becomes

but that where any particular case involves circumstances to which the framers of the rule do not appear to have adverted, and which therefore could not be made available in a court of law, there courts of equity will interpose for the purpose of giving to such circumstances the effect to which they may be equitably intitled. See p. 21.

By the rule of law it feems to be fettled, that a leffee having covenanted to pay rent, shall not be difcharged from his covenant, though the premifes be destroyed by fire, &c. If a court of equity, without requiring circumstances which the rule of law does not reach, will, in direct opposition to this rule, relieve the leffee, in all cases in which the enjoyment of the demised premises is lost, it must be admitted that equity does in fuch cases control the law; but if the case involve some particular circumstances, of which the leffee could not avail himself at law, but which in conscience ought to be respected, its interference does not control, but proceeds on the ground of the rule of law not being applicable to, or framed to meet fuch case. If the lessor covenants to rebuild the premises in the event of their being burnt down, as a court of law could not in an action for rent advert to this covenant, a court of equity might perhaps be induced to reftrain the leffor from proceeding in fuch action, it being against conscience, that a man should insist on the benefit of a covenant, which was induced by another covenant, which he refuses or neglects to perform. The decision seems also to break

becomes money received for the use of him that paid it, and he may recover it in

break in upon another rule of equity; namely, that when the equity is equal, the law shall prevail. If the premises demised are destroyed by accident, as fire, &c. the loss of the rent must fall either on the lessor or lesfee. The law fays, the leffee shall fustain the loss, (unless he has guarded against such contingency by a covenant in his leafe,) that is, that he shall continue to pay the rent, though he can no longer enjoy the premifes. To relieve him from this legal liability, it must be contended, that he has a higher equity than the leffor: but how is this proposition to be made out? Is fault imputable to the leffor? if not, why subject him to a loss from which the law protects him, and which the lessee has not, by the terms of the lease, required him to bear? I refrain from preffing the circumstance, that, perhaps, fome degree of neglect may be imputable to the leffee in most cases of accident, because I conceive the argument merely requires the leffor to have an equal equity, in order to intitle him to the full benefit of his legal right, and this principle and reafoning the court of exchequer appears to have recognized in Hare v. Groves, 3 Anstr. 687.

(b) This conclusion does not appear to be a fair result from the cases. The principles upon which courts of law proceed upon the subject of warranty, so strongly tend to reconcile the claims of convenience with the duties of good faith, that I cannot conceive the mean by which they can receive an additional extent, or be in any degree circumscribed, without endangering the interests which they are now so well

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in an action at law (k). So if A. fells land to B. who afterwards becomes a bankrupt,

calculated to preferve. To excite that diligence which is necessary to guard against imposition, and to fecure that good faith which is necessary to justify a certain degree of confidence, is necessary to the intercouse of society. These objects are attained by those rules of law, which require the purchaser to apply his attention to those particulars which may be supposed within the reach of his observation and judgment; and the vendor to communicate those particulars and defects, which cannot be supposed to be immediately within the reach of fuch attention. If the purchaser be wanting of attention to those points, where attention would have been fufficient to protect him from furprize or imposition, the maxim caveat emptor ought to apply; but even against this maxim he may provide, by requiring the vendor expressly to warrant that which the law would not imply to be warranted. If the vendor be wanting of good faith, fides fervanda is the rule of law, and can scarcely be more effectually enforced in equity than it is at law, fee Fulbeck's Parallel 16. and Pothier des Obligations, par. 1. c. 2. art. 3. where the principle is fully confidered and illustrated.

If courts of equity were to break in upon those distinguishing principles, all contracts would be indefinite in the extent of their obligation; but to keep within their boundaries, puts no interest in hazard; for wherever fraud can be imputed, another principle attaches, which, though in some instances more effective in courts of equity, is equally recognized at law.

rupt, part of the purchase-money not being paid, in this case there is a natural equity (1), that the land should stand charged

law, namely, that no man shall take advantage of his own wrong.

- (i) The case referred to (Conyers v. Hamond) was in equity; the relief given seems to fall within those principles of public policy, upon which the court proceeded in Law v. Law, Forrest. 140. and Morris v. M'Cullock, Amb. 432. If so, the decision is not to be referred to the doctrine of implied warranty.
- (k) In the fale of goods, the law implies the warranty of title; fee c. 2. p. 109. note (x); for the purchaser cannot have better evidence of title to goods than the possession of the vendor: if therefore that fail, he ought to be relieved, and may be, at law.
- (1) In Blackburn v. Gregson, 1 Bro. Ch. Rep. 424. Lord Camden is stated to have observed, that in Chapman v. Tanner, which is the case referred to, the vendor had a natural equity to a lien on the estate, he having some of the deeds in his hands; and the same observation was made on that case by Lord Apsley, in Fawell v. Heelis, Amb. Rep. 724. But this circumstance does not appear necessary to bear out the decision: for in Walker v. Preswicke, 2 Vez. 622. Lord Hardwicke C. stated, "that if a conveyance be made of land, the money not paid, as against vendee, his heir, or any claiming under him as purchaser, with

(3) Chapman v. Tanner, 1 Vern. 267.

charged with fo much of the purchasemoney as was not paid, without any special agreement for that purpose (3). So where the husband had bound himself to fettle an annuity upon his wife during her widowhood, and she had conveyed her estate to her husband; in both deeds there was a power of revocation, and they were both in the custody of the wife: after the husband's death she conceals the deed by which she conveyed her own estate; and after many years, when the arrears of the annuity would be worth more than her own estate, she fets up the bond; this shall not prevail; for the cause of granting fuch annuity was not fubfifting.

notice of this equity, the land may be reforted to." See also Pollexsen v. Moore, 3 Atk. 272. which, though stated in Fawell v. Heelis, to be misreported, is, in Blackburn v. Gregson, upon reference to Lord Hardwicke's note, admitted to be in substance right. The note is as follows: "I delivered my opinion, that the remainder of the estate purchased was to be liable, by virtue of the equitable lien." See p. 153. note (e).

SECTION

IN the matter of rents, the law of England is, ex vi termini, more particular and strict: for redditus and reddere is the fame as restituere; and these words reddendo inde, or refervando inde, are as much as to fay, that the leffee shall pay fo much of the iffues and profits at fuch days to the leffor (1): and therefore it is (1) Co. Litt. not due or payable before the day (m); and if the land be evicted (n), or lease de- 1 Ch. Ca. 83termined before, no rent shall be paid (2);

Harrison v. Lord North,

(2) Clun's cafe, 10 Rep. 128. a, Co. Litt. 292. b. Walker's case, 3 Rep. 22. Lord Rockingham v. Oxenden, 1 Salk.

- (m) The rent is not due till the last minute of the natural day; for if the leffor dies after fun-fet, and before midnight, the rent shall go to the heir, and not to the executors, Co. Litt. 202. a. per Hale, 2 Sand. 287. Lord Rockingham v. Oxenden, 1 Salk. 578. but fee E. of Stratford v. Lord Wentworth, Pre. Ch. 555. and 11 G. 2. c. 19.
- (n) If an eviction be pleaded in bar to rent, it must be rent grown due after the eviction, Baynton v. Bobbett, 2 Ventr. 68. the eviction must also be an actual eviction: for a mere entry, or trespass will be no suspension of the rent, Bushell v. Lechmere, 1 Ld. Raym. 369. Bull. Ni. Pri. 176, 177. Hunt v. Cope, Cowp. 242.

for there shall never be any apportionment in respect of part of the time (0), as upon

(b) The ti G. 2. c. 19. f. 15. has, in certain cases, altered the law as to the apportioning of rents, in point of time; it being thereby enacted, That if "any tenant for life shall happen to die before, or on the day on which any rent was referved or made payable upon any demise or lease of any lands, tenements, or hereditaments, which determined on the death of any fuch tenant for life, that the executors or administrators of such tenant for life shall and may, in an action on the case, recover of and from such undertenant or undertenants of fuch lands, tenements, and hereditaments, if fuch tenant for life die on the day on which the fame was made payable, the whole, or if before fuch day, then a proportion of fuch rent, according to the time fuch tenant for life lived, of the last year, or quarter of a year, or other time in which the faid rent was growing due as aforefaid, making all just allowances, or a proportionable part thereof respectively."

Before this statute the rent, by the death of a tenant for life, was lost; for the law would not suffer his representative to bring an action for the use and occupation, much less if there was a lease, and the remainder-man had no right, because the rent was not due in his time; nor could equity relieve against this hardship by apportioning the rent, Jenner v. Morgan, 1 P. Wms. 392. but see Anon. Bunb. 294. The legislature having, however, by the above statute, interposed in favour of tenants for life, its provisions have, by an equitable construction, been extended to tenants

upon eviction of part of the land (p). But although rent-service was not apportionable,

in tail, where leases are determined by their deaths, Pagett v. Gee, Amb. Rep. 198. Vernon v. Vernon, 2 Bro. Ch. Rep. 659.

But though the executor of tenant for life is now intitled to an apportionment of the rent, yet the dividends of money directed to be laid out in lands, and in the mean time to be invested in government securities, and the interest and dividends to be applied, as the rents and profits would in case it were laid out in land, were held not to be apportionable, though tenant for life died in the middle of the half-year, Sharrard v. Sharrard, 3 Atk. 502. Wilfon v. Harman, Amb. Rep. 279. 2 Vez. 672. Pearly v. Smith, 3 Atk. 260.; and the authority of the case on the will of Lord C. J. Holt, 3 Vin. Ab. 18. pl. 3. was denied. But where the money is laid out in mortgage till a purchase could be made, the interest is apportionable, Edwards v. Countels of Warwick, 2 P. Wms. 176. This distinction, however, may be referred to interest on a mortgage being in fact due from day to day, and fo not properly an apportionment: whereas the dividends accruing from the public funds are made payable on certain days, and therefore not apportionable; and upon the principle of this diffinction the Master of the Rolls decreed an apportionment of maintenancemoney, it being for the daily subfishence of the infant, Hay v. Palmer, 2 P. Wms. 501. See also Mr. Cox's note (1). And the principle extending to a separate maintenance for a feme covert, such apportionment has in fuch case been allowed at law, Vol. I. Cc Howell

(3) 1 Roll's Ab. 234 pl. 2. 4 Ba. Ab. 368. 18 Vin. Ab.

(4) Modgkins v. Robson, 1 Vent. 276. able, any more than rent-charge (3), till the statute of quia emptores terrarum, which, being made only for the benefit of the lord, does not extend to rent-charge or seck; yet it seems at common law (4), rent-service might be apportioned by the act of God, or the law (q); though by the

Howell v. Hanforth, 2 Bla. Rep. 1016. Q. Whether equity would not apportion dividends of money in the funds, directed to be applied for the maintenance of an infant, or fecured by the husband as a separate provision for his wife, as it would be difficult for them to find credit for necessaries, if the payment depended on their living to the end of a quarter? That equity will not in general apportion dividends, see Rashleigh v. Master, 3 Bro. Ch. Rep. 99.

As to apportionment of fines paid on renewal of leases by tenant for life, see Nightingale v. Lawson, 1 Bro. Ch. Rep. 440. Stone v. Theed, 2 Bro. Ch. Rep. 443. and the cases there referred to. As to apportionment of charges, see Rives v. Rives, Pre. Ch. 21. James v. Stailes, Pre. Ch. 44. Ballett v. Spranger, Pre. Ch. 62. Jones v. Silby, Pre. Ch. 288. White v. White, 4 Vez. 24. Buckeridge v. Ingram, 2 Vez. Jun. 652.

- (p) In what cases eviction of part of the land is a ground for apportionment, see Co. Litt. 148.
- (q) Lord Coke concludes, from Littleton, f. 222. not having referred to the stat. quia emptores, that rent-fervice was apportionable at common law, Co. Litt. 148. a...

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act of the party it was otherwise. And by the same reason, in conscience, if a man be ignorant that he hath such a rent out of the land, which is ignorantia sacti, or that the law would extinguish his whole rent by a purchase of part of the land, which is ignorantia juris; even a rentcharge (r) shall in such case be apportioned (5).

(5) Slater v. Buck, Mole-

ley's Rep. 257. Dr. & Stud. Dia. 2. c. 16.

(r Regularly, at law, there can be no apportionment of a rent-charge, because it is an entire thing, 1 Rol. Ab. 234.; as if a grantee of a rent-charge purchase part of the land, he cannot bring a writ of annuity, because it was by the grant a rent-charge, and he hath discharged the land of the rent-charge by his own act. But if the rent-charge be determined by the act of God or of the law, yet the grantor may have a writ of annuity, Co. Litt. 148. and if determined by the act of God, it may in some cases be apportioned; as if part of the land, out of which the rent issues, descend on the grantee, 1 Rol. Ab. 236. pl. 5.

CHAP. VI.

Of the Execution of the Agreement.

SECTION

TT remains in the last place, that we I speak of the execution of the agreement: and 1st, That we inquire what ought to be done on the part of him who fues for a performance; for when a man stakes upon him any duty, not absolutely gratis, but upon the prospect of the other's doing fomething on his fide, the obligation to make good his undertaking is only conditional (1); and, therefore, in the law of nature, it is a general rule, That the particular heads of a contract are in the place of fo many conditions (2); and in conditions all things remain, before they are accomplished, in the same state as if there never had been any covenant (3). So at common law, in executory contracts, pro (a) makes a condition precedent (4), except

(1 See c. 5. 1. 8. note (a).

(2) Puff. B. 3. c. 8. f. 2.

(g) i Dom. Civ. Law, 45.

(4) Co. Litt. 204. a. Comper v.

Andrews, Hob. 41. Clarke v. Gurnell, 1 Bulf. 167.

> (a) Pro, in executory contracts, makes a condition; but in contracts executed, as a feoffment, leafe.

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except in some special cases: as 1st, Where a day is appointed for the performance, and the day is to happen before the thing can be performed on the other side (5). 2dly, Where they are mutual and distinct covenants (b), and not one in consideration

(5) Thorpe v.
Thorpe,
1 Salk. 171. 1
L. Raym. 662.
1 Lutw. 245.
Peters v. Opie,
1 Ventr. 177.
Lockev. Wright
8 Mod. 42.
5 Vin. Ab. 71.

lease, &c. it is the consideration, and doth not amount to a condition. In the case of conditions annexed to contracts executory, as an annuity pro una acra terræ, or pro decimis, or pro consilio, if the grantee of the acre be evicted, or if the grantee of the tithes be disturbed in his enjoyment, or if the grantee, pro consilio, refuse to give his counsel, the annuity will cease; but if A. be enseoffed for such considerations by which the state of the land is executed, the failure of the consideration, as the eviction of the acre, the disturbance of the tithes, or the denial of counsel, will not avoid the estate. See Co. Litt. 204. Wood's Inst. 231.

(b) "The dependance or independance of covenants is to be collected from the evident fense and meaning of the parties; and however transposed they might be in the deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance." Per Lord Mansfield, Jones v. Berkley, Dougl, 665. See also Hotham v. the East-India Company, 1 Term Rep. 638. Morton v. Lamb. 7 Term Rep. 125.

Where the participle, doing, performing, paying, repairing, is prefixed to a covenant, it is clearly a mutual

(6) Ughtred's cafe, 7 Rep. 10. Clarke v. Gurnell, 1Bulf. 167. Smith v. Shelberry, 2 Mod. 33 Stile, 186. Hob. 106. Nichols v. Raynbred, Hob. 88. Kingfton v. Prefton, E. 13 Geo. 3. cited in Jones v. Berkley, Doug. 664. (7) Hunlock v. Blacklowe, 2 Saund. 155. 1 Mod. 64. 1 Sid. 464.

of the other (6). 3dly, Where the covenant on the plaintiff's part is in the negative, which may be broken at any time during his life (7); for every man's bargain is to be taken as he intended, when he gives credit, and relies upon his remedy, it is reasonable that he should be left to it: but a man shall not be compelled to trust when he never intended it (8).

(8) Thorpe v. Thorpe, 1 Lord Raym. 662.

mutual covenant, and not a condition precedent, Boone v. Eyre, 2 Bla. Rep. 1312. Allen v. Babington, Sid. 280. Atkinfon v. Morrice, 12 Mod. 503. But where the covenant goes to the whole confideration on both fides, there it is a condition precedent, Duke of St. Albans v. Shore, Bla. T. Rep. 270.

Where the covenants are mutual and distinct, the defendant cannot plead a breach by the plaintiff, in bar of the plaintiff's action for a breach by the defendant; for the damage may be unequal, and therefore each party must recover against the other the damages he fustained, Cole v. Shallett, 3 Lev. 41. Thompson v. Noel, 1 Lev. 16. Howlett v. Strickland, Cowp. 56. But fee Calonel v. Briggs, I Salk. 122. Goodison v. Nunn, 4 Term Rep. 761.

SECTION II.

HE therefore, who demands the execution of an agreement, ought to shew that there has been no default in him (c) in performing all that was to be done on his part (1); for, if either he will not, or through his own negligence cannot (2), Lock v. Wright, perform the whole on his fide, he has no Powell v. Pillett title in equity (d) to the performance of Duchels v. the

(1) Calonel v. Briggs, 1 Salk. 112. Duke of Hamilton, 28 March, 1727.

Grounds and Rud, of Law and Equity, p. 18. c. 4. Blackwell v. Nash, 1 Str. 535. Goodifon v. Nuno, 4 Term Rep. 761. (2) Butcher v. Hinton, 1 Ch. Ca. 302. Keen v. Stukeley, Gilb. Rep. 155. Pope v. Roots, 7 Bro. P. C. 184. Earl of Feversham v. Watson, Rep. Temp. Finch. 445. 2 Freem. 35. Hatton v. Long, Rep. Temp. Finch. 12.

- (c) Where the plaintiff appears to have taken all proper steps to the performance of his part of the agreement, but has been prevented from the completion of it by the neglect or default of the defendant, his endeavours will, both at law and in equity, be confidered as equivalent to performance, Roll's Ab. 455. 457, 458. Litt. f. 335. Blackwell v. Nash, 1 Str. 535. Hotham v. East-India Company, 1 Term Rep. 638.
- (d) The plaintiff, in equity, if he has not performed his part of the agreement, must not only shew that he was in no default in not having performed it, but must also allegde that he is still ready to perform it: whereas, at law, if the covenants be not precedent, but distinct and independent, the plaintiff need not alledge nor offer a performance of his covenants to entitle him to recover against the defendant for the breach

the other party, fince such performance could not be mutual. And upon this reasoning it is, that where a man has tri-fled, or shewn a backwardness in performing his part of the contract, equity will not decree a specific performance in his savour (e), especially if circumstances

of his. See f. 1. note (b); Pordage v. Cole, 1 Sand. 320. Nichols v. Raynbred, Hob. 88. But fee Calonel v. Briggs, 1 Salk. 112. Goodison v. Nunn, 4 Term Rep. 761.

(c) Neither will equity decree an agreement which appears to have been discharged afterwards by parol, though the original agreement was in writing, Goman v. Salisbury, I Vern. 240. Lord Milton v. Edgworth, 6 Bro. P. C. 580. Legal v. Miller, 2Vez. 299. will equity interpole if the agreement has not been infifted on for many years, Wingfield v. Whaley, 5Vin. Ab. 534. pl. 38. Powell v. Hankey, 2 P.Wms. 82; fee also Orby v. Trigg, o Mod. 2., unless the suspenfion of it can be accounted for by special circumstances; fee c. 4. f. 27.; but the plaintiff not having performed his part of the agreement precifely at the time flipulated, is not a sufficient ground for a court of equity to refuse its assistance, Gibson v. Paterson, I Atk. 12. Puicke v. Curtis, 4 Bro. C. R. 329. Lloyd v. Collett, 4 Bro. C. R. 469. unless from the nature and object of the contract compensation cannot be made, Newman v. Rogers, 4 Bro. Ch. Rep. 391.; for if compenfation can be made courts of equity will dispense not only with the exact performance of the contract, in point

stances (2) are altered. So if a man buys land, or certain shares of a ship, and secures the money, (viz. by giving bond, &c.) if the feller will not make an affurance when reasonably demanded, he shall lofe the bargain; for the party ought not to be perpetually bound without having a performance (4). But if a third perfon should take a conveyance with notice, and without tender and refufal, he would be liable. So where there was an agreement between lord and tenant for inclosing a common, that the tenants should guit their rights of common, and the lord should release them all of quit-rents, the inclosure was prevented by pulling down the fences, and the tenants continue to use the common; this is a waver of the agreement (5).

(3) Hayes v. Caryll, Jan. 1702. 5 Vin. Ab. 538. pl. 18 See post. B. 1. c. 6. f. 12.

(4) Legatt v. Hickwood, 2 Ch. Ca. 5.

(5) Lady Lanefborough v. Ockshott, 2 Bro. P. C. 116. 2 Eq. Ca. Ab. 207. 5 Vin. Ab. 8. pl. 31. 516. pl. 24.

point of time, but also with circumstances of description, if not very material, Calcraft v. Roebuck, I Vez. Jun. 221. Calverly v. Williams, I Vez. Jun. 210. Conolly v. Parsons, 3Vez. Jun. 625. in a note.

SECTION III.

BUT if a man has performed a valuable part of the agreement, and is in no default for not performing the residue (f), there it seems but reasonable, that he should have a specific execution of the other part of the contract (1), or at least that the other side should give back what he has received, or use his best endeavours, that he be not a loser by him. For since he entered upon the performance in contemplation of the equivalent he was to have from the person with whom he contracted, there is no reason

(f) Chief Baron Gilbert distinguishes those cases in which the plaintiff is in statu quo, as to all that part of the agreement which he has performed, from those in which he is not in statu quo, observing, that where he is in statu quo, equity will not enforce the agreement, if the plaintiff cannot completely perform the whole of his part of it. But if the plaintiff has performed so much of it that he cannot be placed in statu quo, equity will, notwithstanding his being incapable of performing the remainder by a subsequent accident, compel the other to perform his part of the agreement. And to this distinction must be referred the difference of decision in the cases of Earl of Faversham v. Watson, Rep. Temp. Finch. 445. and Meredith v. Wynn, Pre. Ch. 312. See Gilbert's Lex Prætoria, 240, 241.

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(t) Meredith v. Wynn, Pre. Ch. 312. Gilb. Rep. 70. Bafkerville v. Bafkerville, 2Vern. 448. See Tyre v. Ball, MSS. 23 Nov. 1792. Ch.

why this accidental loss should fall upon him more than upon the other (2).

(2) See ch. 5. f. 8. n. (g).

SECTION IV.

AND some say, That in all cases of penalty or forseiture that lie in compensation (g), equity will relieve (1); for

(1) Hayward v. Angell, 1 Vern. 222.

where

Ld. Bauce, 1 Salk. 156. Cage v. Ruffell, 2 Vent. 8. 352.

(g) But though equity will in certain cases relieve against forfeitures, it will not avoid the act which works it at the instance of the party doing the act, Wentworth v. Turner, 3Vez. Jun. 3. "There are also some forfeitures which do not allow of compensation, as forfeitures which may be confidered as limitations of the estate, and which determine it when they happen. Tenant for life making a greater estate than his own, gives up or furrenders the right which he had before, and yet he does no damage to the remainder man; fo tenant by copy, taking upon him to make a greater estate than by law he may, and contrary to the nature of his estate, does by that determine his estate: the law has made it so; and to relieve against it, (unless in case of fraud,) would be directly repealing the law." Sir H. Peachy v. D. of Somerset, I Stra. 452. There are also forfeitures which do allow of compensation,

but

(2) Woodman v. Blake, 2Vern. 222. Bertie v. Ld. Falkland, 3 Ch. Ca. 135. where they can make compensation, no harm is done. So that although an express time be appointed for the performance of a condition, the judge may, after that day is past, allow a reasonable space to the party, making reparation for the damage, if the damage be not very great, nor the substance of the covenant destroyed by it (2). As where the condition is for the payment of money at a certain time; for they may allow interest for it

but to which this rule of equity has been held not to extend, as where tenant for life of a copyhold commits wilful waste, equity will not relieve, Thomas v. Porter, 1 Ch. Ca. 96. Pre. Ch. 547. but see Northcote v. Duke, Amb. Rep. 511. or where a copyholder obstinately or for a length of time refuses to do fuit and fervice, or to repair, Cox v. Higford, 2 Vern. 664. or grants leafes without licence, which might in time be used as evidence of the premises being freehold, or destroys the ancient boundaries of the estate, Sir H. Peachy v. D. of Somerset, Pre. Ch. 568. But though equity will not in general relieve against forfeitures for wilful waste, it will relieve against forfeitures for permissive waste, Pre. Ch. 574. I have qualified the rule as to wilful wafte, relief having been given in the cafe of Nash v. Lady Derby, 2Vern. 537. against a forfeiture incurred by the plaintiff, it appearing that he had applied in repair upon the copyhold the timber which he had felled, and which at law was held to be wafte.

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from the day it should have been paid (3), and the forfeiture is a penalty which is a subject matter of relief (b). But where it is for the doing a collateral act, they cannot know of what value it is to the party (4). And at law, that which is granted or referved under a certain form, is never drawn to a valuation or compensation; and he shall make his own grant void, rather than the certain form of it should be wrested to an equivalent (5). For the law allows every man to part with his own interest, and to qualify his own grant, as he pleases; and therefore will not suffer any fatisfaction or recompence to be given in lieu of it, if the thing be not taken as it is granted. So in equity, if a creditor agrees to take a fum of money

(3)Barnardifton v. Fane, 2Vern. 366. Northcote v. Duke, Ambl.Rep.511.

(4) Sweet v. Anderson,1723. 5Vin. Ab. 93. pl. 15.

(5) LordBacon's Maxims, max. 4. Woolly v. Bp. of Exeter, Cro. Jac. 69t. but fee Collard v. Travard, 2 H. Bia. Rep. 324. House of Lords, 1795.

(b) "The true ground of relief against penalties is, from the original intent of the case where the penalty is designed only to secure money, and the court gives him all that he expected or desired; as in the case of penalties for non-payment of rents or sines, which are only by way of security of the rent or sine; and therefore when these are paid with interest, the money itself is paid according to the intent, only as to the circumstance of time; which is the true soundation of equitable relief." See 1 Stra. 453. See also Sloman v. Walter, 1 Bro. Rep. 418. see 4 G. 2. c. 28. as to forseiture for non-payment of rent.

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(6) Sewell v.
Muffon,
1Vero. 21 t.
Jory v Cox.
Pre. Ch. 160.
Brown v.
Brown v.
Browns.
1 P Wms. 652.
Nichols v.
Maynard,
3 Atk. 519.

less than his debt (i), if paid at such a day, he cannot be relieved, if the money is not paid (6). So where A. seized in see, and having three daughters, devises to trustees to convey to the eldest, if she shall pay 6000l. to her two sisters in six months; and if not, then gives the like pre-emption to the second, and then to the third: the money must be paid punctually to the time, and Chancery will not enlarge it (7).

(7) Mafton v. Willoughby,

7 Feb. 1705. 5Vin. Ab. 93. pl. 12.

(i) But if the condition of a bond or deed be to pay a higher rate of interest if the debt be not paid on a certain day, equity will confider fuch condition in the nature of a penalty, and relieve against it, Lady Holles v. Wyfe, 2Vern. 289. Shode v. Parker, 2Vern. 316. Walmfley v. Booth, Barnard. 481. The decision in the case of Halifax v. Higgins, as reported in 2Vern. 134. is certainly irreconcilable with these decisions; but it is observable, that it was differently cited in Lady Holles v. Wyse, it being there stated that the interest was reserved at 6 per cent. but if duly paid, the mortgagee agreed to accept of 5 per cent.; and this is probably the most accurate statement; for in Jory v. Cox, Pre. Ch. 161. it is faid that the agreement to take 5 per cent. was by a distinct deed. If, therefore, the first agreement was for 6 per cent. to be reduced to 51. upon condition of punctual payment, the decision falls within the rule of the cales cited in the margin, and cannot affect the above distinction.

SECTION V.

A ND we must agree, that men's deeds and wills, by which they fettle their estates, are the laws that private men are allowed to make, and they are not to be altered even by the King in his courts of law, or conscience. So that, in case of conditions subsequent (k), that are to defeat an estate, they are not favoured in law; and if the condition becomes impossible by the act of God, the estate shall not be defeated or forfeited. And though a court of equity may relieve to prevent the devesting an estate; yet it cannot relieve to give an estate that never vested. And if the party himself, who was master of the estate, and might have disposed of it as he pleafed, is to be tied down to the terms and circumstances he had im-

⁽k) The substantial distinction which governs the interference of courts of equity in cases of conditions broken, is not whether the condition be precedent or subsequent, but whether compensation can or cannot be made. See c. 4. s. 1. note (c), and the cases there cited. See also Hayward v. Angell, 1 Vern. 222. Bland v. Middleton, 2 Ch. Ca. 1. Francis's Maxims, P. 49.

(1) Bertie v. Ld Falkland, 2Vern. 339. 3 Ch. Ca. 129. 1 Salk, 231. Popham v. Bamfield, 1 Vern. 83. Thomas v. Howell, 1 Salk. 170. 4 Mod. 66. Fry v. Porter, 1 Ch. Ca. 138.

posed upon himself, and those that claim or derive under him; those to whom he gives an estate upon terms and conditions must stand much more obliged to the performance of the conditions and circumstances upon which it is given (1); and if the condition becomes impossible, even by the act of God, the estate will never arise (1). But conditions to restrain marriages annexed to legacies stand upon other reasons; because legacies being recoverable properly in the ecclefiastical court, where the civil law obtains, are here (m) to be interpreted by the fame law, that there may be a conformity in the

- (1) Though courts of equity, equally with courts of law, recognize the rule cujus est dare illius est disponere, yet there are fome conditions, the breach of which will not induce a forfeiture of the benefit to which they are annexed; as where a legacy is given on condition that the legatee does not dispute the teftator's will, if there be causa probabilis litigandi, the legatee having disputed the will, will not be a forfeiture of his legacy. Powell v. Morgan, 2Vern. 90.
- (m) See c. iv. f. 10. note (q), in which I have attempted to illustrate the principles, and to bring together and class the various cases and distinctions upon which our law proceeds respecting conditions in restraint of marriage.

laws

laws that govern them: and by the civil law, these restraints are odious and not binding; and so by our law, unless there be an express devise over, more than the law implies.

SECTION VI.

A S to the manner in which the agreement is to be carried into execution. it is to be observed, that there are some rules peculiar to certain kinds of agreements relievable only in this court. Others belong more properly to the municipal law. As for the first, contracts are divided into gainful or chargeable (1). Gainful contracts bring some advantage to one party gratis; and therefore in these, the magistrate is obliged to proceed according to the stated forms and rigour of law; for else a man's generofity might prove too great a burthen to him, if he should be bound to do more than he he has ex-VOL. I. $\mathbf{D} \mathbf{d}$ pressly

(1) See Grotius, lib.2. c.12. f.2. Puff. b. 5. c.2. f. 8. where this difference is very fully confidered.

pressly declared. But chargeable contracts bind both fides to an equal share of the burthen, for here we act, or give, in order to receive an equivalent. that they may well admit of equity in the interpretation: fince the obligation being mutual, neither party ought to be over-burthened. And the Court of Chancery makes the same difference between voluntary and mutual agreements. And therefore the intent of marriage articles appearing to be a reciprocal contract between them for fettling each other's claim, ought not to be extended larger on one fide than on the other. But equity will not carry a covenant, being a free gift, beyond the letter (2).

(2)Baffe v. Gray 2Vern. 690.

SECTION VII.

SO although limitations of estates, whether it were by way of trust, or by estate executed at the common law, are to be governed by the same rule (1), and the court must take the words as they find Bale v. Coleman them (n): yet where settlements are agreed

(1) Watts v. Ball 1 P.Wms. 108. 1 P. Wms. 142. 2 Vern. 670. Cowper v. Cowper, 2 P. Wms, 736.

Maffenburgh v. Ash. 1 Vern. 257. Atkinson v. Hutchinson, 3 P.Wms. 258. Spencer, 2 Atk. 574. Jones v. Morgan, 1 Bro. Ch. Rep. 206.

(n) In the construction of limitations which include or carry the legal estate, the rule is the same in courts of law and equity. And if the rule of law required the words in which fuch limitations are framed to be construed in all cases according to their strict legal import, courts of equity could not, without endangering the interests of property, depart from such settled and established rule of construction. But in those cases in which the first rule of law is allowed to bend to the plain and manifest intent, courts of equity may, without imputation, proceed upon the fame liberal principle of construction. That there are rules of law of this flexible nature may be collected from the feveral authorities referred to by Sir William Blackstone, in his argument upon delivering judgment in the exchequer chamber, in the case of Perrin v. Blake. See Mr. Hargrave's Law Tracts, 489.; but they are rules, to adopt the expression of that learned authority, of the fecond and third class; for as to those rules which are the great fundamental principles of juridical policy, Dd 2

(2) Trevor v.
Trevor,
Trevor,
Eq. Ca. Ab.
387. 1 P.Wins.
622. 1 Bro.
P. C. 122.
Jones v. Laughton, 1 Eq. Ca.
Ab. 392. c. 2.
Nandick v.
Wilkes, 1 Eq.
Ca. Ab. 393.
c. 5.
Cufack, 1 Bro.
P. C. 470.
Dodd v. Dodd,
Amb. Rep. 274.

for upon valuable confideration, this court will aid inartificial words, and make an artificial fettlement (2). As in the common case of marriage-articles, where they are so penned, as that if a settlement were made in the precise words of them, the husband would be tenant in tail; yet this court will order it to be settled on the husband for life only, and then upon the first and other sons. For articles are only minutes or heads of the agreement of the parties, and therefore ought to be so modelled when they come to be carried into execution, as to make them effectual ac-

they posses that degree of sanctity that even the most plain and directly manifest intent is not allowed to weaken, much less to superfede, their operation. See c. 3. s. 1. note (b). But though courts of equity are, in the construction of such limitations as carry the legal estate, bound to consult with the rules of law, yet in the decreeing the execution of marriage articles, and in the construction of executory trusts, they regard the end and consideration of the settlement and intent of the trusts, beyond the legal operation of the words in which the articles or trusts are expressed. See Mr. Fearne's Essay on Contingent Remainders, p. 124. 4th edit. See s. 8. note (q). See also c. 3. s. 11. note (p), 190. Honor v. Honor, 1 P. Williams, 123. Roberts v. Kingsley, 1 Vez. 238.

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cording to the intent (0). And if the parties come into a court of equity for a specific execution, the court will provide, not only for the sons of that marriage (p), by proper limitations, but likewise for the daughters

(0) To secure the end and consideration of the settlement is the motive which induces the interference of courts of equity; but as that object might be equally defeated by allowing the wife to take an estate tail in her own lands, as by allowing the husband to take an estate tail; the articles in such case shall in the same manner be controlled by the end and confideration of the fettlement, Jones v. Laughton, 1 Eq. Ca. Ab. 392. But where the wife takes an estate tail by the articles ex provisione viri, courts of equity will not interpose to fettle it otherwise, because in such case the wife, by II H. 7. c. 20, is reftrained from aliening after the death of her husband, and cannot in his life-time alien without his concurrence, Honor v. Honor, I.P. Williams, 123. Green v. Ekins, 2 Atk. 473. 477. Whatelev v. Kemp, cited in Howel v. Howel, 2 Vez. 358. And as the power of aliening the estate by the husband and wife jointly is not unreasonable, equity will not control articles referving fuch a power, Highway v. Banner, 1 Bro. Ch. Rep. 584.

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(p) Equity will not, in favour of the issue, extend the provisions of the articles, if the articles do make some provision for the issue, though such provision does not affect the whole of the settled estate; for it is not unreasonable for the parents to reserve some power to themselves, Chambers v. Chambers, 2 Eq. Ca.

daughters (q). And even although a fettlement were actually made in pursuance of such articles before marriage, equity will rectify it, in favour of the issue semale.

Ca. Ab. 35. c. 4. Fitzgibbon's Rep. 127. Howell v. Howell, 2 Vez. 358.

(q) This must be understood where there is no other provision for the issue semale; for if by the articles, portions are to be raised for the daughters, equity will consider such portions to be the whole extent of the benefit intended them, and will not interpose to give them a further benefit; and this seems to be the principal distinction between the case of Honor v. Honor, I. P. Wms. 123. West v. Errissey, 2 P. Wms. 349. and Powell v. Price, 2 P. Wms. 535.

SECTION VIII.

BUT equity will not interpose in case of a bare volunteer (1). And therefore in a devise (p), if the estate is executed, the Longdale,

2 Vern 456. 2 Ventr, 365. Coleman v. Sarrill, 1 Vez. Jun. 50.

(p) In the case of Papillon v. Voice, 2 P. Wms. 471. the Master of the Rolls appears to have doubted whether

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the law must take place; but if executory only (2), the intent and meaning is to be pursued (q). As if A. devises lands to trustees

(2) Leonard v. E. of Suffex, 2 Vern. 526. Papillon v. Voice, 2 P.Wms. 478.

Glenarchy v. Bo'ville, Forrest. 3. Earl of Stamford v. Hobart, 1 B.o. P. C. 288. Basker-ville v. Baskerville, 2 Atk. 281. Roberts v. Dixwell, 1 Atk. 607. Gower v. Grosvenor, Barnard. 62,

whether the rule laid down in Shelley's case applies to a devise; but whatever doubt his Honour entertained upon the point, it feems to be done away by the very express decifions cited by Sir William Blackflone, in his argument in Perrin v. Blake, to which I have already had occasion to refer. See Whiting v. Wilkins, 1 Bulft. 219. Rundale v. Eley, Cart. 170. Broughton v. Langley, 1 Lutw. 814. 2 Ld. Raym. 873. In addition to these authorities, Mr. Fearne has referred to Pawfey v. Lowdall. Burchett v. Durdant, 2 Ventr. 311. Legate v. Sewell, 1 P. Wms. 87. Goodright v. Pullen, 2 Ld. Raym. 1437. Morris v. Le Gay, cited 2 Burr. 1102. 2 Atk. 249. Coulfon v. Coulson, 2 Stra. 1125. 2 Atk. 247. Sayer v. Masterman, Ambl. Rep. 344. King v. Burchell, Ambl. 379. Wright v. Pearfon, Ambl. 358. Ambrose v. Hodgfon, Dougl. Rep. 323. To which authorities many more might be added: they are, however, fully fufficient to the purpose, of shewing, that whatever doubt upon this point might have occurred to his Honour in the case of Papillon v. Voice, it was a doubt which was neither fanctioned by former decisions, and which has not been supported by subsequent.

(q) If a feries of uniform decisions, by great and learned men, can give conclusive authority to any distinction, rhe distinction here stated seems to me to be

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irustees to pay debts and legacies, and then to settle the remainder on her son B.

in possession of such claim. It has however, been remarked, that " in many of the cases on this subject, distinctions have been taken and relied upon between legal and equitable estates, and between trusts executed and executory, and from Doe v. Laming, 2 Burr. 1108. the opinion of Buller J. in Hodgson v. Ambrose, Dougl. 327. and Jones v. Morgan, Bro. Ch. Rep. 206. it feems that fuch distinctions no longer exist in courts either of law or equity." That the rule of construction of limitations, including or carrying the legal estate, whether an immediate devise or a trust executed. is the fame both at law and in equity, is admitted; but the question is, whether the distinction between fuch trufts as are executed, and fuch as are purely executory, is still a found, substantial, and effective diftinction, or a distinction which has nothing real or equitable to support it? Before I apply myself to the establishing of the affirmative proposition, namely, that fuch distinction is still a found, substantial, and effective distinction. I shall beg the reader's attention to the cases whence I conceive it will most conclusively appear that fuch distinction did formerly prevail. first case reported, in which this distinction appears to have been relied on, is Leonard v. Earl of Suffex, 2 Vern. 526. which was a devise to trustees for payment of debts, and in trust to settle the remainder on A.B. and the heirs of his body with remainder, &c. ever taking fpecial care in fuch fettlement that it never be in the power of A. B. &c. to dock the intail during his life, &c. The court decreed that A.B. should be only tenant for life, without impeachment of waste, and fhould

and the heirs of his body, with remainder over; and directs, that special care should be

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should not have an estate tail conveyed to him; and the reason assigned for the decree was, because here the estate is not executed, but only executory. In this case nothing could be more evident than the intent of the testator to restrain the alienation of the estate by A. B. but if the estate had been devised immediately to A.B. or by way of trust executed, could such intention, evident as it was, have received effect? I should conceive that it could not. The next case in which the distinction was recognized and adopted was, the Earl of Stamford v. Hobart, I Bro. P. C. 288. in which case Lord Cowper expressly stated, as the ground and principle of his decision, that "in matters executory, as in case of articles, or a will directing a conveyance, where the words of the articles or will were informal or improper, that court would not direct a conveyance according to fuch improper or informal expressions in the articles or will, but would order the conveyance or fettlement to be made in a proper and legal manner, fo as might best answer the intent of the parties." But in the case of Papillon v. Voice, the force of the distinction is particularly observable; for Lord Chancellor King not merely flated that fuch a diffinction did exift, but marked its effect, by allowing the legal rule to prevail as to that limitation in the will which included or carried the legal estate, and by allowing the intent to control the legal rule, as to that part of the same will which was purely executory, though the words of the will were, except as to this difference, precifely the fame. His Lordship's judgment is thus reported: "As to the other

Book I.

be taken in the fettlement, that it should never be in the power of her fon to dock the

other point, Lord Chancellor declared, the court had a power over the money directed by the will to be invested in land, that the diversity was where the will passes a legal estate, and where it is only executory, and the party must come to this court, in order to have the benefit of the will, that in the latter case the intention should take place, and not the rules of law." In Lord Glenorchy v. Bosville, the distinction between trusts executed and executory was not only admitted, but the reason and principle upon which the distinction proceeds, is emphatically affigned. Lord Chancellor Talbot thus expresses himself: "But there is another question, viz. How far, in cases of trusts executory as this is, the testator's intent is to prevail over the ftrength and legal fignification of the words? I repeat it. I think, in cases of trusts executed, or immediate devises, the construction of the courts of law and equity ought to be the fame; for there the testator does not suppose any other conveyance will be made: but in executory trufts, he leaves fomewhat to be done; the trusts to be executed in a more careful and accurate These authorities are certainly fully sufficient to the purpose of shewing that the distinction between trusts executed and executory was at least once allowed in our courts of equity as a clear, well known, and rational diffinction, upon which grave and learned men might frame and rest their judicial decisions. But as Lord Hardwicke, in the case of Bagshaw v. Spencer, 2 Atk. 583. is reported to have observed, that " all trusts are in the notion of law executory, and are to be executed in this court," it feems material to re-

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the intail; the fon shall be only tenant for life, but without impeachment of waste.

And

fer to those cases in which his Lordship has expressly recognized the distinction between trusts executed and trusts executory, lest it should be inferred from the above observation, that his Lordship intended to reject fuch distinction. In Roberts v. Dixwell, 1 Atk. 607, Lord Hardwicke C. observes, "In the present case here are all forts of trusts, as to mortgage, sale, &c. but the latter part of the trust is merely executory, to be carried into execution after the performance of the antecedent trust: the whole direction therefore falls upon this court, and they are to direct how the parties are to convey. This court has taken much greater liberties in the construction of executory trusts, than where the trufts are actually executed; as in the cases of the Earl of Stamford v. Hobart, Papillon v. Voice, and Lord Glenorchy v. Bosville. These cases shew that the court has taken a greater latitude, and the point which has governed them has been the intention of the testator." In Baskerville v. Baskerville, 2 Atk. 281. his Lordship is reported to have proceeded on the same distinction: "Here it is a bequest of a sum of money to be laid out in land, and therefore merely executory." The direct terms in which Lord C. Hardwicke appears in Roberts v. Dixwell, and Baskerville v. Baskerville, to have recognized and proceeded on the diffinction between trusts executed and trusts executory, will at least justify the prefumption, that he did not intend, by his obfervation in Bagshaw v. Spencer, to reject such distinction; and especially as the expression allows of a different construction; for as Mr. Fearne has observed. " the

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And it is as strong in the case of an executory devise for the benefit of the issue,

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"the first part of the position is true, that all trusts are in notion of law executory; but it does not follow that courts of equity may not distinguish trusts themselves into executed and executory;" Essay on Con. Rem. 212. 4th edit. which they have done, by confidering the trufts as executory where a conveyance is by the testator directed in contradistinction to those trusts in which no fuch executory medium is referred to. The cafe of Jones v. Morgan, 1 Bro. Ch. Rep. 206. being referred to, as one of the cases whence he draws his inference, the observation of Lord Thurlow, C. in referring to the case of Glenorchy v. Bosville, that it was an executory case, is at least sufficient to raise the prefumption, that his Lordship did not intend, in deciding the case at bar, to reject the distinction between trusts executed and executory. Having referred to the authorities which feem to me to afford the most irrefragable proof that such distinction was once known to. and allowed to prevail in, our courts of equity, I will now proceed to confider the cases whence it is inferred that fuch distinction no longer exists.

The first case referred to is Doe v. Laming, 2 Burr. 1108. The passage relied on I conceive to be this: "It was contended at the bar, that as to this point, there was a distinction between a trust and a legal estate; and that even in Chancery there was a distinction upon this point, between what they call a trust executed and a trust executory. It is true these distinctions are to be met with, and have been mentioned, but there does not seem to be much solidity in either."

as if the like provision had been contained in marriage-articles. But had she by her will

either." Per Lord Mansfield. If the opinion of any fingle judge be sufficient to repel the force and to destroy the effect of a series of uniform decisions, I am far from unwilling to concede to that learned authority a well-founded claim to fuch extraordinary influence; but if the concurrent opinions of Lord Cowper, Lord King, Lord Talbot, and even of Lord Hardwicke, prefiding in a court of equity, called upon by the strongest sense of duty to inform themselves of the principles and extent of equitable jurisdiction, and fupported in the discharge of that duty by the most distinguished abilities, can give to any distinction a weight and confequence fufficient to bear up against the opinion of any fingle judge, however pre-eminent his natural endowments, or professional acquirements; I should submit, with great deference, to such an authority, that the distinction between trusts executed and trusts executory is now too deeply rooted in our equitable fystem to be shaken by its force.

The next case referred to is Ambrose v. Hodgson, Dougl. Rep. 323. in which case Mr. Justice Buller certainly has very distinctly stated, that the first and great rule in the exposition of all wills is, the intention of the testator expressed, which, if consistent with the rules of law, shall prevail. It is a rule to which all others must bend: It says, if consistent with the rules of law; but it must be remembered, that those words are applicable only to the nature and operation of the estate, and not to the construction of the words." The well-known accuracy of the reporter of that case

will,

will devised to her sons an estate-tail, the law must have taken place, and they have barred

will, I am perfuaded, justify my prefuming the opinion of the learned Judge to be fully and correctly stated; and as I cannot discover in that opinion a single paffage which expressly denies the diffinction between trusts executed and executory, I must conclude, that fuch diffinction, if affected in any degree by the opinion, is affected by inference necessarily deducible from it; and I do agree, that the rule of construction laid down in that opinion does go a confiderable way towards destroying the distinction; for when it is faid that the intent shall prevail, if consistent with the rules of law, and that "the question, whether the intention be confistent with the rules of law; can never arise, till it is settled what the intention was;" and "this can only be discovered by taking the whole will together," the rule is flated (if by intention be meant the fubflantial and primary intention) with a latitude fufficient to comprehend the principle upon which courts of equity have proceeded in the construction of executory trufts; and in that view the distinction between trufts executed and executory may be fuperfluous. It is easy to lay down general rules; the difficulty is in the application of them. That courts of equity did at least formerly apply a principle of construction to executory trusts, which they did not conceive to be applicable to immediate devises or trusts executed, has been demonstrated by the cases referred The first of those cases, Leonard v. Earl of Suffex, is particularly apposite to the purpose of trying whether the rule of legal construction, as above stated, be the rule by which courts of law will proceed in the construction barred their issue, notwithstanding any subfequent clause or declaration in the will, that

construction of wills; and if the application of the legal rule of construction to the circumstances of that case would induce a similar decision in a court of law, it will follow, that the necessity of fuch distinction is materially leffened: but if the application of the rule of legal construction would lead to a different decision, one of these consequences must follow, either the decree in that case was against the intent, or that the true rule of legal construction is not sufficiently comprehensive in its application to every case to effectuate the intent. I have already stated the directions of the will in that case; but the repetition will, I trust, be excused. A. devises lands to trustees for the payment of debts, and afterwards to fettle the remainder, one moiety to her fon B. and the heirs of his body, taking fpecial care in the fettlement that it never be in the power of her faid fon to dock the intail of this moiety. The intention of the testatrix, that B. should not have it in his power to alien, is expressed in terms; the neceffary confequence of fuch an intimation of intention, (if the substantial intent be to prevail,) seems to be, that he should not take an estate to which the right of alienation by recovery would be incidental; but suppose the devise had been immediate or by way of trust executed to B. and the heirs of his body, followed with a clause, restraining him from suffering a recovery, could fuch intention, restrictive of a right incidental to an estate tail, have received effect either in law or equity? Where the trust is executed, it is agreed that the rule of law must prevail. What is the rule of law upon this point? I will state it from Mr.

that they should not have power to dock the intail; for a devise differs from marriage

Justice Buller's opinion in Ambrose v. Hodgson. man cannot by will," &c. " prevent a tenant in tail from fuffering a recovery." But the legal import of the words of the will give an estate tail, subject to fuch restrictive clause, " shall they prevail?" If it be faid that fuch clause, being restrictive of the right of alienation incidental to an estate tail, furnishes evidence that the intention of the testator was to give an effate to which fuch right of alienation was not incidental, and that courts of law will, in the construction of the devise, reject the effect of the words of limitation; the judgment of law would be the fame as was the decree in equity. But it would remain for courts of law to state that kind of case to which, in the construction of a devise, the rule which determines that a testator shall not prevent the devisee of an estate tail from fuffering a recovery, and that therefore the repugnant clause shall be rejected, would be effectively applicable; for it feems to my apprehension, that every limitation in which fuch intention, restrictive of the right incidental to an estate tail, appeared, would furnish a ground for cutting down the estate tail, (though created by express technical words) to an estate for life; left, by allowing the terms of limitation their full force and effect, the object of the clause restrictive of their confequence should be disappointed. But if, in the case of Leonard v. Earl of Sussex, the devise had been immediate, or the trust executed, followed by a clause that the devisee should not alien or dock the intail, and a court of law could not, in respect of the declared intention of the testator, that the devisee

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riage articles in this respect, that the issue under marriage-articles claim as purchasers

devisee should not alien, have given effect to such intention, for that the devise being of an estate tail, the restrictive clause was repugnant, and could not be supported, it must follow as a necessary consequence, that either the decree in equity upon that case was wrong, in giving effect and operation to the restrictive clause, or that the distinction upon which the decision of the court proceeded, namely, that the trust was executory, gives a wider range than has the rule which governs courts of law and equity, in the construction of immediate devises or trusts executed. But if that part of the legal rule of construction, " if confishent with the rules of law," be applicable only to the nature and operation of the estate or interest devised, and not to the construction of the words; and if, in order to ascertain the estate intended to be devised, the whole of the will is to be confulted, (which I agree in certain cases it must,) the legal rule of construction so stated. appears to me absolutely incapable of receiving an additional extent in equity; and that those clauses which have hitherto been conceived to be void, because repugnant, ought to control those words of limitation to which they are repugnant; for where a man devises an estate in terms which carry a fee-simple or fee-tail, and proceeds to declare his intent, that the devise shall not alien the devised estate; it seems to be a fair inference, that in using terms which carry the absolute or qualified fee, he was either unacquainted with their technical import, or being acquainted with their import, had inadvertently applied them; their legal effect being so inconsistent with his intention, declared in Vol. I.

(3) Bale v. Coleman, 1 P. Wms. 145. chasers (3), but under a will they are only volunteers (r).

terms, not of a peculiar technical fignification, but of plain, familiar, and common use. How far the apparent intent ought, in the case of immediate devises, to control certain established rules of legal construction, has been considered in a tract published by Mr. Hargrave, entitled, "Observations concerning the Rule in Shelly's Case," with a profundity of learning, to which nothing could have added effect but the precifion and energy with which it is applied. I shall therefore beg to refer to the arguments there urged, as furnishing demonstration upon this part of my proposition, that in the construction of immediate devises or trusts executed, the most evident intention of the party must give way to those great and fundamental rules which ferve as land-marks in the disposition of real property.

The case of Jones v. Morgan is also referred to; but after giving to the very elaborate judgment in that case the most attentive consideration, I continue at a loss to discover the premises whence it can be concluded, that the diffinction between trusts executed and trufts executory no longer exists. I have already referred to the observation which fell from Lord C. Thurlow, when confidering the effect of Lord Glenorchy v. Bosville, that it was an executory case. The observation feems to admit that fuch cases might exist, and inclines me to conclude, that its object was to diffinguish such cases from the case at bar, which, to adopt his Lordship's expression, if not the case of a legal estate, was only not so, because the first use, (payment of debts,) might absorb the whole estate. I have been led by the the importance of the point into a train of observations much beyond my original intent, but the respect due to the authorities relied upon, demanded more than ordinary attention; I cannot conclude without acknowledging the assistance which I have derived from Mr. Fearne's valuable essay.

(r) This distinction between the issue being purchasers under marriage-articles, and only volunteers under a will, will not hold in those cases in which the will creates an executory trust in their favour; "for every cestury que trust, whether a volunteer or not, or be the limitation under which he claims with or without consideration, is entitled to the aid of a court of equity, in order to avail himself of the benefit of the trust." Per Sir Jos. Jekyll, 3 P.Wms. 222.

SECTION IX.

AND as this court is to enforce the execution of agreements, and regards the substance only and not forms and circumstances (1), it therefore looks upon things agreed to be done as actually performed (s), as money covenant-

(1) Francis's Maxims, max. 13.

ed

(s) Upon this principle it was held that the personal estate of a man, who, in consideration of marriage E e 2 with

ed (t) to be laid out in land to be in fact a real estate (v), which shall descend to the

with an orphan of a citizen of London, had covenanted to take up his freedom of the city, should be divided according to the custom, though the covenant was not performed, Frederick v. Frederick, I P. Wms. 710. But it may be material to remark, that nothing is looked upon in equity as done but what ought to be done, not what might have been done; nor will equity consider things in that light in favour of every body, but only for those who had a right to pray it might be done. Per Sir Thomas Clerke, Burgess v. Wheate, Bla. Rep. 123. 2Vern. 284. 3 Atk. 680.

(t) The rule equally applies to money devised to be laid out in land. The authorities to shew that money agreed or directed to be laid out in land, is to be confidered as land, are very numerous. The force of the rule is particularly evinced by those cases in which it has been held, that the money agreed or directed to be laid out so fully becomes land, as, 1st, not to be perfonal affets, Earl of Pembroke v. Bowden, 3 Ch. Rep. 115. 2 Vern. 52. Lawrence v. Beverley, 2 Keble, 841. cited also in Kettleby v. Atwood, I Vern. 741.; 2dly, to be subject to the courtesy of the husband, though not to the dower of the wife, Sweetapple v. Bindon, 2Vern. 536. Otway v. Hudson, 2Vern. 583.; 3dly, to pass as land by will, if subject to the real use at the time the will was made; fee c. 4. f. 2. note (n). See also Milner v. Mills, Mosely, 123. Greenhill v. Greenhill, 2 Vern. 679. Pre. Ch. 320. Shorer, 10 Mod. 39. Lingen v. Sowray, 1 P.Wms. 172. Guidott v. Guidott, 3 Atk. 254.; 4thly, not to pals

the heir (2). So where money is agreed on marriage to be laid out in land, and fettled

(2) Babington v. Greenwood, 1 P. Wms. 532. Lechmere v. E. of Carlifle, 3 P.Wms 211. Forreft. 90. Edwards v.

Countels of Warwick, 2 P.Wms. 171. Chaplin v. Horner, , P.Wms. 483. Scudamore v. Scudamore, Pre. Ch. 543. Hancock v. Hancock, 1 Eq. Ca. Ab. 153. c. 8. Knight v. Atkins, 2Vern. 20.

pass as money by a general bequest to a legatee; but it will, by particular description, as so much money to be laid out in land, Cross v. Addenbroke, Fulham v. Jones, cited in a note to Lechmere v. Earl of Carlifle, 3 P. Wms. 222. or by a bequest of all the testator's estate in law and equity, Rushleigh v. Masters, I Vez. Jun. 204. But equity will not consider money as land, unless the covenant or direction to lay it out in land be express, Symons v. Rutter, 2Vern. 227. Curling v. May, M. 8 G. 2. cited in Guidott v. Guidott, 3 Atk. 255. And as money agreed or directed to be laid out in land shall in general be considered as land, fo land agreed or directed to be fold shall be confidered and treated as money, Gilb. Lex Prætoria, 243. and the creditors of the bargainor may compel the heir to convey the land, Best v. Stamford, I Salk. 154.; but it must be understood, that where a testator directs his real estate to be fold for purposes which are answered out of the personal estate, that the next of kin may infift upon the real estate's being fold, for " there is no equity between the next of kin and the heir, but the general principle is that the heir takes all that which is not for a defined and specific purpose given by the will." Chitty v. Parker, 2Vez. Jun. 271. Ex parte Bromfield, IVez. Jun. 453. Oxendon v. Ld. Compton, 2Vez. Jun. 69. Walker v. Denne, 2 Vez. Jun. 170. Lord Compton v. Oxenden, 2 Vez. Jun. 261.

fettled to the use of the husband and wife for their lives, remainder to their first and other sons in tail, remainder to the daughters in tail, remainder to the right heirs of the husband, provided, that if the husband died without issue, the wife might make her election, whether she would have

and where the testator was intitled to a fund, as money or land, his real and personal representatives shall take it, as money or as land, according as the testator would have taken it, see Ackroyd v. Smithson, and the cases there cited, I Bro. Ch. Rep. 503. see also Hewitt v. Wright, I Bro. Ch. Rep. as to Lord Thurlow's opinion, that money resulting to the heir, as being produced by sale of real estate undisposed of, is to be considered as personal estate of the heir, and as such would go to his executor. But if the use and possession were not united it would still be considered as land, Rashleigh v. Masters, 1 Vez. Jun. 201.

(v) If the particular estate contracted for cannot be had, the money shall be laid out in other land, Whitaker v. Whitaker, 4 Bro. Rep. 31. But it may be material to remark, that this rule of considering money as land, or land as money, does not apply, if the special purpose for which the money is directed to be laid out, in land, or the land to be converted into money, fail, Cruse v. Baily, 3 P.Wms. 20. Mallabar v. Mallabar, Forrest. 79. Dunour v. Matteux, 1Vez. 320. Ackrovd v. Smithson, 1 Bro. 503. Robinson v. Taylor, 2 Bro. 589. Spink v. Lewis, 3 Bro. 355.; neither does it apply if the effect would operate an escheat, Walker v. Denn, 2Vez. Jun. 170.

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the land or money; this money is bound by the articles, and shall not be affets to fatisfy creditors, but the heir shall have it, as the land should have gone, in case the money had been laid out according to the articles; and here the husband having issue at his death, though it died soon after, he could not be said to die without issue, so no election could arise to the wise (3).

(3) Kettleby v. Atwood, aVern. 471.

SECTION X.

BUT some say, that although money shall in many cases be considered as land, when bound by articles, in order to a purchase; yet whilst it remains still money, and no purchase made, the same shall be deemed as part of the personal estate of such person who might have aliened the land, in case a purchase had been made (u).

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(u) The authority of the case referred to was very much shaken by the observations which sell from Sir Joseph Jekyll, Master of the Rolls, and Lord Talbot

As if the limitation were to be of the lands. when purchased, to the husband for life, remainder to his intended wife for life. remainder to first and other sons in tail. remainder to daughters, remainder to the right heirs of the husband; this money, though once bound by the articles, yet when the wife died without iffue, became free again, and was under the power and disposal of the husband, as the land would likewise have been, in case a purchase had been made purfuant to the articles, and therefore would have been affets to a creditor, and must have gone to the executor or administrator of the husband; and the case is much stronger, where there is a re-

C. in their respective judgments in Lechmere v. Earl of Carlisle, 3 P.Wms. 220. Forres. 90. Lord Thurlow C. has, however, restored its weight, by expressly recognizing and deciding upon its principles, in the case of Pulteney v. Earl of Darlington, "that where a sum of money is in the hands of one, without any other use but for himself, it will be money, and the heir cannot claim;" "like the case (added his Lordship) of Chichester v. Bickerstaff, against which, I think, there is no judgment, though there are a number of opinions. I know no better authority than that case," see note (t).

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fiduary legatee (1). Yet there can be no (1) Chichester fine levied of money (2) in trustees hands to be laid out in lands (u).

v. Bickerstaff, 2Vern. 295. Pulteney v. Earlof Darlington, 1 Bro. Ch.

Rep. 236. Wade v. Paget, 1 Bro Ch. Rep. 368.

(2) Ben'o1 v. Benfon, 1 P. Wms. 130,

(u) But a decree will bind the money as effectually as a fine could have bound the land, for equity alone views it in the light of real estate; and whatever doubts formerly prevailed respecting the right of such person to the money, who, if the money had been laid out in land, might, by fine, have acquired an absolute estate in the land, (see Eyre's case, 3 P.Wms. 13.) it feems now to be fettled, that wherever a fine would have rendered the party absolute owner of the land, he is immediately intitled to a decree for the money; fee Benson v. Benson, 1 P. Wms. 130. Edwards v. Countess of Warwick, 2 P.Wms. 171. Oldham v. Hughes, 2 Atk. 452. Trafford v. Boehm, 3 Atk. 440. 447. Cunningham v. Moody, 1 Vez. 174. But if a recovery would have been necessary for such purpose, equity will decree the money to be laid out, that those in remainder may have their chance, Short v. Wood, I P. Wms. 471. Colwall v. Shadwell, cited 1 P. Wms. 471. 485. Edwards v. Countess of Warwick, 2 P.Wms. 171. Cunningham v. Moody, 1 Vez. 174. Collett v. Collett, 1 Atk. 11. Trafford v. Boehm, 3 Atk. 447. The reason of this distinction is, that a fine may be taken in vacation, fo as to bar the iffue, but a recovery can only be suffered in term time. See Carter v. Carter, Forrest. 272. That equity will not decree the money to an infant, who would be tenant in tail with remainder in fee, as he could not levy a fine during his infancy; See Carr v. Ellison, 2 Bro. C. R. 56. Earlom v. Sanders, Ambl. 242.

SECTION XI.

BUT 2dly, We are to treat of fuch rules as belong more immediately to the municipal law: fince where there is no particular motive for equity to interpose, the court of Chancery follows the law. here we may observe in general, that interpretation is a collection of the meaning out of figns most probable: And these are words and other conjectures. words, the rules are well expressed in the ancient form of making leagues, which appointed, that the words should be expounded fairly, in the common fense that the words bore in that place at that time (1). And the difference is apparent between writs and deeds, or wills (x). For in adverfary writs, nothing shall be demanded or recovered, but according to its proper fignification: and therefore a reputed name will not ferve. But in deeds or wills they shall be taken according to the common intendment and phrase of the

(1) Grotius lib. 2. c. 16. f. 1. Puff. b. 5. c. 12. Livy, lib. 1. 24.

(x) The rules which govern the construction of deeds and wills are very particularly considered in Shepherd's Touchstone, ch. 5. and 2 Bla. Com. 379.

country;

country; and so in a verdict, or an amicable writ; as a fine or recovery. But as to names, either of the person or thing, in deeds and wills, or amicable writs, the general rules are these: 1st, Quod de nomine proprio non est curandum dum in fubstantia non erretur, and therefore a reputed or known name is fufficient: and this need not be time out of mind, as in prescriptions, but such convenient time as they may be known by fuch name in vicineto where it is to be tried. 2dly, Quod nihil facit error nominis cum de corpore constet (2); and therefore, where the thing passes by livery, præsentia corporis tollit errorem nominis (y). 3dly, If there be two of the same name (3), there the intent shall be taken (z). 4thly, In case

(2) Sir Moyle Finch's case, 6 Rep. 64.

(3) Lord Bacon's Maxims, reg. 23. Lord Cheney's case, 5 Rep. 68.

- (y) Lord Bacon, in his Maxims, reg. 25. has illustrated this rule by a great variety of cases, to which I beg to refer.
- (z) In such case, for the purpose of collecting the intent, parol evidence must be admitted, ambiguitas verborum latens verificatione suppletur nam quod e sacto oritur ambiguum, verificatione sacti tollitur. See Ulrich v. Lichsield, 2 Atk. 372. Dowset v. Sweet, Ambl. Rep. 175. Fonnereau v. Poyntz, 1 Bro. Ch. Rep. 472. Stebbing v. Walkey, 2 Bro. Ch. Rep. 85.

- (4) The case of the Chancellor of Oxford, 10 Rep. 53. b. Dr. Avray's case, 11 Rep. 21.
- (5) Counden v. C lerke, Hob.
- (6) Burchett v. Durdant, 2 Ventr. 311. Pollexf 457. 2 Lev. 232. S.C.
- (7) Baker v. Hall, 1 Eq. Ca. Ab. 214 pl. 12. Stra 41. Newcomen v. Barkham, 2 Vern. 729. Pre. Ch. 442. 461. Mr. Hargrave's note, Co. Litt. 33. b. Stra. 35.
- (8) Co. Litt. 24. b.

of a corporation (4) or common person, a description, which is vice nominis, is sufficient, if the person be so described as he may be certainly distinguished from other persons (5). As heirs of the body of J.S. now living (a) is tantamount to heir apparent (6). So, where he takes notice in the will, that others were his heirs general; a limitation to his brother's fon by the name of heir male, is a good name of purchase (7). But as all devises to disinherit an heir at law are to be taken strictly. and the words heirs male being a legal term, where they are not accompanied with any other words to determine the fense otherwise, as heir apparent, or heir now living, &c. they cannot amount to a fufficient description of the person (8), if there be another who is heir general (b).

Spink v. Lewis, 3 Bro. Ch. Rep. 355. Baugh v. Read, I Vez. Jun. 259.

(a) And as a limitation to the heirs of the body of A. then living, shall be good as designatio personæ, notwithstanding the rule non est hæres viventis; so a limitation to the heirs of the body of A. then begotten, shall prevail. See Darbison on dem. of Long v. Beaumont, I P. Wms. 229. I Bro. P. C. 489. Goodright v. White, 2 Bla. Rep. 1010.

But a remainder to the heirs male of the body of E. L. is good, though E. L. is living

(b) The cases in which it has been held that the person described as an heir special need not answer both parts of the description, by being actually heir, as well as that species of heir denoted by the description, seem to have materially broken in upon the doctrine of Lord Coke upon the fubject; fee Co. Litt. 24. b. and which doctrine has been purfued in many cases, exclusive of those on which Lord Coke relied, particularly in Counden v. Clerke, Hob. 29. Southcott v. Stowell, I Freem. 216. Lord Offulton's case, 3 Salk. 336. and Dawes v. Ferrers, 2 P. Wms. 1. Starling v. Ettrick, Pre. Ch. 54. Mr. Hargrave has, with his usual ability, attempted to vindicate the propriety of Lord Coke's doctrine, observing, that it may be doubted whether there is a paffage in all his works more capable of standing the severest test of modern criticism; and having examined the circumstances of the cases supposed to have weakened its authority, concludes his note p. 32. (a), with remarking, that Lord Cowper's judgment, in Newcomen v. Barkham, which was materially shaken in its principle by what fell from Lord Hardwicke, in decreeing upon the bill of review, is the only direct authority against Lord Coke. In a following note, however, p. 164. (a), he candidly admits, that fince writing his former note, a case has been published, in which the Court of King's Bench, after three arguments, decided against applying the above rule to a will, Wills v. Palmer, 5 Burr. 2615. and that in another, which was also three times argued, the Court of Exchequer had refused to apply

living at the time when the remainder happened to take place, and the heir apparent shall take (0).

(9) Datbifon fhall take (on dem. Long v. Beaumon, 1 P. Wms. 229.

the rule to a marriage-settlement, Evans on dem. of Burtenshaw v. Weston, Exch. M. 1774, or H. 1775. This concurrence of authority, the result of so much deliberation, for both courts appear to have weighed the subject with the most anxious attention, seems to have given a weight to the decree in Newcomen v. Barkham, beyond that to which Lord Hardwicke thought the principle entitled. I cannot, however, conclude this note, without recommending the reader to consult Mr. Hargrave's observations in support of Lord Coke's dostrine, that to take as a purchaser by description of a special heir, every part of the description must unite in the claimant. See also Mr. Fearne's Essay on Con. Rem. p. 319. 4th edit. and Gwynne v. Hooke, I Wils. 30.

SECTION XII.

AND not only the place, but the time is material; for the contract takes effect immediately (1), and therefore is to be interpreted as matters flood at the time (2).

(1) Domat, Civ. L. b. 1. tit. 1. f. 3 5. (2) Marsh v. Jones, 2 Leo.

As

117. Humphreys v. Knight, Cro. Car. 455. Beity v. Doimer, 12. Mod. 526.

As in a loan, the value is to be estimated, as it was at the time of the contract (3). So in a will, the value of a legacy of fugars, payable fuch a year, after the time is elapsed, becomes a personal duty to be paid in money here, of a mean value of the fugars there in that year (4). So if a fettlement for a jointure is made in purfuance of articles, and there is a covenant in the articles, that the lands are of fuch a yearly value, but it is omitted in the fettlement; yet the covenant shall be decreed in specie, but the value of the lands is to be estimated, with reference to the time of the jointure fettled, and not according to the present value, unless the covenant had been that they should continue of their then value (5). But every man is to fuffer for his own delay or neglect. And therefore he who does not perform his part of the contract at the time agreed on by the parties, or appointed by law. must stand to all the consequences (c). As if

(3) Ellis v. Lloyd, 1 Eq. Ca. Ab. 289. pl. 3.

(4) Symes v. Vernon, 2 Vern. 553.

(5) Speake v. Speake, 1 Verm, 217.

(c) See c. 6. f. 2. in which the principle upon which courts of equity relieve against lapse of time is considered, and several cases illustrative of its reason and extent are particularly referred to. Many other cases might

if A. is bound to transfer stock before the 30th of September to B. and the time is past, and the stock much risen; he shall still be obliged to transfer so much stock in specie, at the price it is now at, and account for all dividends from the time that it ought to have been transferred (6).

(6) Gardner v. Pullen, 2 Vern.

394. but see c. 1. s. 5: note (o). c. 2. s. 11. note (b). c. 3. s. 1. note (c).

might however be added, in which equity has refused to relieve against the lapse of time, when the covenant, not being mutual, some particular act was to be done by the one party, to intitle himself to the benefit of a covenant by the other. Thus in Allen v. Hilton, MSS. 22 Feb. 1738, the defendant had covenanted to renew the plaintiff's leafe, at the request of the plaintiff, within three months before the expiration of the then granted leafe. The leafe being within a month of expiring, and the plaintiff not having requested a renewal, the defendant agreed to leafe the premifes to other perfons. The plaintiff then being in possession, applied for a new leafe, which defendant refufing, he filed his bill. The Lord Chancellor was clearly of opinon, that the plaintiff, having omitted to apply at the time agreed on, was not entitled to relief; observing, that if a leffee were relievable in such a case, he knew not where the court could stop; it would be faying, the leffee shall be loofe, and the leffor bound. It may be observed that the case referred to, was a leafe of a colliery, which, from the nature of the property, might have influenced the judgment of the court; and the Chancellor certainly does appear, in the note which I have of the cafe, to have adverted to fuch circumstance; but his Lordship seems to have rested

his decision upon general principles, and not upon the particular circumstances of the case. So in the case of Baily v. Corporation of Leominster, Lord Thurlow C. held, that a lesse for lives, intitled by covenant to a renewal on application whenever one of the lives should fall, was not entitled to such renewal upon his application, when two lives were dropped, though he offered to pay the sines, &c. for both lives; his Lordship observing that the covenants were not mutual. See Armiger v. Clarke, Bunb. 111, 112.; but see Rawstone v. Bentley, 4 Bro. Ch. 418.; see also Baynham v. Guy's Hospital, 3Vez. 295.

SECTION XIII.

IT is certain, therefore, that when words may be fatisfied, they shall not be restrained further than they are generally used, but they are to be understood in their proper and most known signification (d).

But

(d) Quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba expressa sienda est, Co. Litt. 147. a. "But where the intention is apparent, too much regard must not be had to the native and proper designition, signification, and acceptance of words and sentences," Shepherd's Touchstone, c. 5. p. 87. "For the Vol. I.

But all the clauses of covenants are to be interpreted one by another, in giving to each of them the fense which results from the whole; for it is one entire deed which ought to agree with itself, and all the words take effect by one livery, and all tend to one end and purpose (e). And all deeds

words are not the principal thing in a deed, but the intent and defign of the grantor; and the law commends the aftutia, the cunning of Judges, in conftruing words in such manner as will best answer the intent. The art of construing words in such manner as shall destroy the intent may shew the ingenuity of counfel, but it very ill becomes a judge." Per Lord C. J. Willes, Dormer v. Parkhurft, 3 Atk. 136. fee also Earl of Clanrickard's case, Hob. 277. see c. 3. s. 1. note (b). But the intent shall not prevail, if inconfiftent with any established rule of law, Plow. 162. b. Corbet's case, 1 Rep. 85. b. Pybus v. Mitford, 1 Hearn v. Allen, Hutt. 86. cites Abra-Ventr. 379. ham and Trigge, cited in Beresford's cafe, 7 Rep. 41. In collecting the intent, common usage is frequently reforted to, Saville, 124.

(e) The construction must be upon the entire deed, and not upon disjointed parts of it; nam ex antecedentibus & confequentibus optima est interpretatio, & turpis est pars quæ suo toto non convenit, I Bulstr. 101. Plowd. 161.; and this rule of conftruction prevails both in law and equity; per L. C. Parker, Butler v. Duncomb, I P.Wms. 457. That a legal instrument shall not be construed by the act of the parties, fee Baynham

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are but in the nature of contracts, and the intention of the parties reduced into writing; and the intention is chiefly to be regarded (1). In an act of parliament, the intent appearing in the preamble shall control (f) the letter (2) of the law; (for the preamble is as a key to open the meaning of the act, though in reality they are no part of the act, and introduced but of late

(1) Per Mafter of the Rolis in Badea v. E. of Pembroke, a Vern. 58. (2) Ryall v. Rolle, 1Atk. 175. 182. 1 Vez. 365. 371.

Baynham v. Guy's Hospital, 3 Vez. 295. Eaton v. Lyon, 3Vez. 694.

(f) This rule was with fome warmth reprobated by Lord C. Cowper, in the case of Copeman v. Gallant, 1 P.Wms. 320. and indeed feems irreconcileable with Barker v. Redding, Palm. 485. Sir William Jones, 163, and the cases there referred to. And though Lord Chief Baron Parker and Lord C. Hardwicke, in the case of Ryall v. Rolle, referred to in the margin (2), rejected the rule laid down by Lord Cowper, that the preamble should not be allowed to restrain the operation of an enacting clause; yet they did not go the length of holding that the preamble should in all cases control and restrain the enacting clause, the Lord Chief Baron expressly confining his position to those cases where not restraining the generality of the enacting clause would be attended with inconvenience, IVez. 365. As to the principal rules to be observed in the construction of acts of parliament, see Introduction to Bla. Com. f. 3. and 3 Rep. 7. Lord Bacon's Readings on Statutes of Uses, 334. Wolfustan v. Bp. of Lincoln, 2Wil. Rep. 174.

Ff2

years;)

years;) and in case of a deed made in purfuance of articles, the articles shew the intent of the parties as much as a preamble can that of an act of parliament (g).

(g) The cases in which equity varies the settlement, the fettlement purporting to be made in pursuance of the articles, may be referred to mistake or fraud; on either of which grounds equity may and will interpose, to enforce the spirit and object of the articles; " Ift, Because they are upon valuable confideration; adly, Because they are to be carried into execution against the parents; 3dly, That were they to put the children completely in the power of either parent, there would be no object of the contract." Per Lord C. Thurlow, Jones v. Morgan, 1 Bro. Ch. Rep. 222.

SECTION XIV.

ND it is a general rule, that feveral deeds made at one time (b), are to be taken as one affurance (1); yet every one

(1) Lord Cromwell's cafe, 2Rep. 74. b. hath

75. a. Earl of Leicester's case, 1 Ventr. 278. Havergill v. Hare, Cro. Jac. 510. White v. West, Cro. Eliz. 792. Ferrers v. Fermor, Cro. Jac. 643. Selwyn v. Selwyn, 2 Burr. 1131-Roe on dem. of Noden v. Grissith, 4 Burr. 1953. Vaughan on dem. of Aikins v. Atkins, 5 Burr. 2764. Williams v. D. of Boiton, 2 Vez. Jun. 138.

(b) Where the first conveyance is imperfect of itfelf. hath its distinct operation to carry on the main design. And therefore where a man covenanted by marriage-articles to pay the legacies charged upon his wife's estate, and gave a statute, and also a mortgage of his own estate, to secure the same, and by an indorsement upon the mortgage the same was to be void, unless the wise's estate was settled upon him for life, &c. according to the marriage-articles: this indorsement, though upon the mortgage only is sufficient to discharge the statute and articles (2). Besides, they being all executed

(2) Laurence v. Blatchford, 2 Vern. 457.

felf, and is to receive its perfection from a subsequent act, then of necessity the two instruments must be taken as one entire conveyance; as covenant to levy a fine or fuffer a recovery, or a covenant for further affurance. and affurance afterwards made: and there is no incongruity that an imperfect thing should wait for its perfection from a subsequent act, for nothing passes in the mean time, (See Seymor's cafe, 10 Rep. 95. b.) But where the first act is of sufficient ability to pass an estate, the law will not expect a future act, though to fome collateral purposes it would pass it stronger." Herring v. Brown, Skinner's Rep. 186. For the various cases in which several deeds will be considered but as one entire conveyance, fee 16 Vin. Ab. 138. It is however observable, that when a deed purports to be an absolute conveyance, a defeafance by a separate deed will be deemed very fu picious, Cottrell v. Purchase, Forrest. 61.

at one and the same time, the same witnesses, and part of the same agreement, are all to be looked upon as but one conveyance. So where a father put his son apprentice, and gave a bond for his sidelity, and at the same time took a covenant from his master, that he should at least once a month see his apprentice make up his cash; this bond and covenant ought to be taken as one agreement (i), and therefore the father shall be answerable for no more than the master could prove the apprentice embezzled in the first month when the embezzlement began (3).

(3) Montague v. Tidcombe, 2Vern. 519.

(i) But where the father, upon payment of a sum which his son had embezzled, desired the master not to trust the son any more with the cash, it was held, that such request would not discharge him from the bond which he had entered into for his son's fidelity; but the court resused to extend his liability beyond the amount of the bond. See Shepherd v. Beecher, 3 P.Wms. 287.

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SECTION XV.

BUT that which helps us most in the finding out the true meaning, is, the reason or cause which moved the will. And this is of the greatest force, when it evidently appears that some one reason was the only motive that the parties went upon; which is no less frequent in laws than in facts. And here that common saying takes place, that the reason ceasing, the law itself ceases (1). So a present made in prospect of marriage may be revoked, and demanded back, if the marriage does not take effect (2), especially, if it sticks on that side to whom the present was made (k). And with this agrees the practice of

(1) Co. Litt.

(2) Cited p.
North E. J.
in Beaumont
v. ———,
2 Mod. 141.
See alfo 14 Vin.
Ab. (Gift) 19.
pl. 7.

(k) The same rule prevailed in the civil law, Dig. 1ib. 12. tit. 4. 2 Huberi Prælectiones, 394, 395. 2 Noodt Com. 228. and still prevails in the law of Scotland under the same title, causa data non secuta, 1 Lord Bankton's Inst. 215. 21. Erskine's Inst. 444. 10. and in the case of King v. Withers, Forrest. 122. Lord Talbot refers to the principle of this rule, de causa data non secuta, as governing the decisions in which portions charged upon land, and made payable at a particular age, or on marriage, have been held to sink into the land where the legatee or party has died before the period when, or event on which they were to

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the court of Chancery, where if a term be raised for a particular purpose in purfuance of marriage-articles, when that purpose is answered, it shall fall again into the inheritance, and shall not be affets to pay any debts, but what affect the inheritance; as bond-debts, and debts of a fuperior nature, and not fimple contracts (3).

(3) Beft v. Stamford, a Salk. 154.

Baden v. E. of Pembroke, 2 Vern. 57, 58. See b. 4. part 2.

be raised. The cases illustrative of that rule, and the exceptions which have been engrafted on it, are referred to by Mr. Cox, 2 P. Wms. 612. and will be confidered b. 2. part 1. c. 8. f. 7. fee also B. 1. c. 6. f. q.

SECTION XVI.

AND the matter which he is about, is always supposed to be in the mind of the speaker; although his words feem to be of a larger extent (1) (1). As general words

(1) See Ognell's cafe, 4 Rep. 48. Cro.Car. 130.

> (1) Where the purpose is distinctly recited in the instrument, inconvenience will rarely result from the general

words in a release of all demands, or the like, shall be restrained by the particular occasion,

general words of the contract, &c. receiving fuch construction as will confine their operation to the declared purpose of the parties. Sensus verborum ex causa dicendi accipiendus est, et sermones accipiendi sunt fecundum subjectam materiam, 4 Rep. 13 b. Payne v. Collier, 1 Vez. Jun. 171. But where the purpose or object of the instrument is not distinctly recited, (Doran v. Ross, I Vez. Jun. 59.) but is to be collected from the fubstance of the instrument, great caution is necesfary in allowing the general expression to be controlled, upon the notion of its exceeding the particular purpose attributed to the parties. In Thorpe v. Thorpe, I Ld. Raym. 235. the court thus stated the distinction: "Where there are only general words in a release, they shall be taken most strongly against the releasor; as where a release is made to A. and B. of all actions, it releases all several actions which the releasor has against them, as well as all joint actions; so if an executor releases all actions, it will extend to all actions that he hath in both rights, 2 Roll's Ab. 409. (A. I.) but where there is a particular recital in a deed, and the general words follow, the general words shall be qualified by the special words." See also Lord Arlington v. Merrick, 2 Saund. 414. But though this diftinction may be generally true, yet there certainly are cases in which it has not been strictly regarded, exclufive of those cases in which, if the general words had been allowed to prevail in their whole extent, an abfurdity or manifest injustice would have ensued; see Porter v. Phillips, Palm. 218. Cro. Jac. 623. Tifdale v. Essex, Hob. 34, and Hoe's case, 5 Rep. 70. b.

So

occasion, and shall be intended only of all demands concerning the thing released (2).

(2) Knight v. demands
Cole, 3 Lev.
273.
Hoe's case,

5 Rep. 70 b. Henn v. Hanson, 1 Lev. 99. Ingram v. Bray, 2 Lev. 102. Morris v. Wilford, 2 Lev. 2:4. Stephens v. Snow, 2 Salk. 578.

in which case some material distinctions are stated. Several cases in which the distinction above stated has not been allowed to prevail, are cited by Lord Bacon, in his Maxims, as illustrative of the rule, "Verba generalia restringuntur ad habilitatem rei vel personæ." To the principle of this rule may also be referred those cases in which courts of equity have interposed and decreed marriage-settlements to be framed strictly, though the articles agreed on by the parties were fo expressed as to give an estate of inheritance to one of For the principal object of fuch fettlement being to provide for the iffue, equity will not allow fuch purpose to be disappointed by general expressions in articles, which from their nature must be supposed to have been intended to be afterwards drawn out and extended with more technical precision and accuracy, with a view to effectuate their reasonably presumed intent; and in fome cases equity has even supplied words to let in the iffue, Kentish v. Newman, I P.Wms. 234. Targus v. Puget, 2 Vez. 194. and as the strict technical fense of words may in some cases be restrained, so in other cases, to effectuate the purpose, it may be extended and enlarged; as where an effate is devised for payment of debts, the fee shall pass, though there be no words of inheritance, North v. 1 Ch. Ca. 196. Ackland v. Ackland, Compton, 2 Vern. 687. So where an estate is devised, on condition that the devifee pay a gross sum-Collier's case, 6 Rep. 16.—but the devisee, without words of inheritance,

I.

So the limitation of the trust of a term, which was the husband's, upon his marriage with A. to himself for life, remainder as to a moiety to A. for life, for her jointure, remainder to the heirs of the body of A. by him begotten, remainder as to the other moiety to the children of the body of A. must be intended the children of that marriage, and not as a provision for any child of her's by any other husband (3). So the condition of a recognizance shall be qualified in equity, according to the intent and equity of the case, for which it was given (4).

(3) Dafforne v. Goodman, 2Vern. 362.

(4) Holt v. Holt, 1 Ch. Ca. 190, 191.

inheritance, or other declaration of devisor's intent, will not take a see, if the payment of such sum is to be out of the rents and profits, Ansley v. Chapman, Cro. Car. 157.

SECTION XVII.

AND from the regard that the law itfelf gives to the intention of the parties, it is that where there is a fine by way (1) Co. Litt, 31. b.

(2) — v. Hawkes, 1 Ch. Ca, 273. p. Matter of the Rolls, 2 Ve rn.

(3) Lingard v. Griffin, 9 Vern. 189.

way of render, there shall be no dower (1): and fo a rent or recognizance shall not be extinguished, by levying a fine to the party (2). And although a fine and nonclaim is a good bar to an equity of redemption, or to a bill of review, yet it would be otherwise where levied upon the making of the mortgage only to strengthen the security (3). But there are some cases where equity (m) will carry the conveyance further than intended upon apparent equity: as if a tenant in tail confess a judgment, &c. and fuffer a recovery to any collateral purpose, that recovery shall enure to make good all his precedent acts and incumbrances (4).

(4) Hunt v. brances (

Poph. 5. 6. 1 Rep. 62. 2 Rep. 52. 1 Wilf. 277. Goddard v. Complin, 1 Ch. Ca. 119. Goodright ex dem. Tyrill v. Mead, 3 Burr, 1703. Cruise on Fines and Recoveries.

(m) The principle that a common recovery shall operate as a confirmation of any preceding incumbrances, created by the person who suffers such recovery, is very properly observed by Mr. Cruise to be founded on natural justice, which forbids men to deseat their own contracts; nor is it necessary to resort to courts of equity in order to make those principles available, courts of law having solemnly recognized their force, and in a variety of cases having given them their sull effect. How such consequences may be obviated, see Mr. Butler's note, Co. Litt. 204. a.

SECTION XVIII.

AND where words, if taken literally, are likely to bear none, or at least an absurd fignification, to avoid such an inconvenience, we may deviate from the received sense of them (n); for the agreement

(n) If an absurdity would result from strictly purfuing the expression of the instrument, courts of law will, equally with courts of equity, cast about to difcover the mean by which the real intent may receive effect, notwithstanding the untechnical language in which fuch intent is expressed; " for though an interpretation or construction ought not to be made against the letter of a deed, yet in some cases a strained and fecondary interpretation may be admitted; and if the letter will bear a fecond and less genuine interpretation, it may be admitted ne detur abfurdum: but where the intention of the parties is not clear and plain, but in æquilibrio, in fuch case a secondary and strained construction shall not be made, but the words shall receive their more natural and proper construction." Per Bridgman C. J. Earl of Bath's case, Carter's Rep. 108, 109. This distinction is agreeable to the rule, benignæ faciendæ interpretationes cartarum propter fimplicitatem laicorum ut res magis valeat quam pereat, Co. Litt. 36. 183. a. which rule is allowed to control the application of every other rule of construction, nam legis constructio non facit injuriam; and therefore, though it be a general rule of construction that quælibet concessio sortissime contra donatorem interpretenda est,

ment of the parties is the only thing which the law regards in contracts. And it is a known rule, that a man's act shall not be void, if it may be good to any intent. For every conveyance is made for fome purpose. So that for the necessity, ne res pereat, where there is no other way of fatisfying the will and intent, the words may be taken in the most extensive and improper sense. As a rent or tithes will pass by a devise of all his lands (1). So a trust to raise out of the profits implies a fale (o), especially if it cannot be raised conveniently

(1) Referred to in Afhton v. Afhton, 3 P.Wms. 384. Acherley v. Vernon, 9 Mod. 74.

> yet if tenant for life maketh a leafe generally, this shall be by construction of law an estate for the life of the leffor; for if it should be a lease for the life of the lessee, it would be a wrong to him in reversion; and fo a leafe by tenant in tail, without mentioning for whose life, shall be construed a lease for life of lessor; but the construction would be otherwise of a lease made by tenant in fee, Co. Litt. 183. 42. a. Shepherd's Touchstone, 88. But, "though a deed may in some cases be expounded contrary to the strict import of its letter, yet this liberty of construction does not extend fo as to make a deed, but merely to avoid fome extremity which might enfue from a literal and strict construction of it." Cheek v. Lisle, Rep. Temp. Finch, 101.

(o) But though equity will in general confider 2 charge

coveniently within the time limited (2). (2) Heycock v. Heycock, Otherwise if it be of the annual profits (3). 1 Vern. 256. Berry v. Alk-

ham, 2Vern. 26. Trafford v. Ashton, 1 P.Wms. 415. Warburton v. Warburton, 2Vern. 420. Green v. Belcher, 1 Atk. 505. (3) Anon. 1Vern. 104. Trafford v. Ashton, 4 420. Green v. Belcher, 1 Atk. 505. P.Wms. 415.

charge on the rents and profits to raise portions, &c. as a charge on the land, if fuch charge be not restrained to the annual profits; yet if no time for payment be appointed, a fale shall not be decreed, Ivy v. Gilbert, Pre. Ch. 583. 2 P.Wms. 13. Evelyn v. Evelyn, Okeden v. Okeden, I Atk. 550.; 2 P.Wms. 669. nor will equity decree a fale of the lands, if any other mode is prescribed by the conveyance to satisfy the charge, as if it contain a power of leafing, or to mortgage the premises, Ivy v. Gilbert, 2 P. Wms. 13. Mills v. Banks, 3 P.Wms. 1.; nor indeed will equity decree a fale in any case in which the rents and profits distinctly appear to have been exclusively intended to fatisfy the charge, Small v. Wing, 3 Bro. P. C. 503. And so much do courts of equity in such cases respect the intention, that Lord Hardwicke held, that where a man creates a trust for payment of debts, and declares the trust of that term to be by perception of rents and profits, or by mortgaging to raife sufficient money for the payment of his debts, it restrains it merely to a payment out of rents and profits. But if it had been a trust of the rents and profits, the term might have been fold for the fatisfaction of creditors." "But where there are other limiting words following rents and profits in a truft for payment of debts, his Lordship observed, that he did not remember any case which would authorise a sale." Ridout v. E. of Plymouth, 2 Atk. 104. and of the fame opinion Lord Loughborough appears to have been in Lingard v. Earl of Derby, I Bro. Ch. Rep. 311. his Lordship conceiving a devise for the payment of debts to be out of the statute. But in Hughes v. Doulben, 2 Bro. Ch. Rep. 614. Lord Thurlow C. was of opinion, that in order to take a devise of real estate for payment of debts out of the statute against fraudulent devises, it must effectively provide for such purpose. This difference of opinion raises a very material question in the consideration of the nature of such an estate, with respect to assets; for if such devise be not within the statute, specialty creditors cannot pursue the estate as legal assets, which if it be within the statute they might do.

SECTION XIX.

LASTLY, there is a difference between testaments and deeds. For in testaments it is only one person who speaks, and his will ought to serve as a law, of which every part shall stand together, if it may (p); and therefore if a man in

⁽p) "Touching the general rules to be observed for the true construction of wills, in testamentis plenius testatoris intentionem scrutamur. But yet this is to be observed with these two limitations: 1. His intent ought to be agreeable to the rules of law. 2. His intent

in the first part of his will devise his land to J. S. and in the latter part to J. N. (1),

(1) Blamford v. Blamford, 3 Bulf 105. per Dodderidge

they

J. Anon. 3 Leon. 11. c. 27. p. Dyer and Brown. Wallop v. Darby, Yelv. 209, 210 Cro. Eliz. 9. 10 Mod. 522. Fane v. Fane, 1Vern. 30.

tent ought to be collected out of the words of the will. As to this, it may be demanded, how this shall be known? To this it may be thus answered: 1. To fearch out what was the scope of the will. 2. To make fuch a construction, so that all the words of the will may fland; for to add any thing to the words of the will, or in the construction made, to relinquish and leave out any of the words, is maledicta glossa. But every string ought to give its found." Per Dodderidge, Blamford v. Blamford, 3 Bulf. 103. See Chapman v. Brown, 3 Burr. 1634., where it is held that the court may imply an intention from what is faid, but cannot from arbitrary conjecture, though founded upon the highest degree of probability, add to a will or supply the omission. See also Targus v. Puget, Robinson v. Robinson, 2Vez. 194. 225. Conyton v. Halvin, cited in Lytton v. Lytton, 4 Bro. Ch. 461. That courts of justice will transpose the words of a will to affect its intent, see Brownsward v. Edwards, 2Vez. 248. Where the intent can be clearly collected, the law will difpense with those technical and formal words which would have been absolutely requisite to effectuate such intent by deed, as a devise to a man for ever, or to one and his affigns for ever, or to one in fee-simple, the devisee shall have an estate of inheritance; for the intention of the devisor is sufficiently plain, though he hath omitted the legal words of inheritance. SeeWidlake v Harding, Hob. 2. So by a devise, an estate tail may be conveyed without words of procreation,. VOL. I. Gg Co.

they shall have a joint estate (q): or if in the latter part, he had devised a rent of it

Co. Litt. 9. b. 27. a. By a will also, an estate may arise by mere implication; as where the devise is to the heir at law of the devisor, after the death of the wife of the devisor, no estate is by express terms given to the wife, yet she shall have an estate for life by implication; but otherwise it would be upon such a devise to the younger fon of the devisor; for there the eldest fon and heir, and not the wife, should have the estate in the mean time, Horton v. Horton, Cro. Jac. 75. See also cases cited I Vent. 376. Cross remainders may also be implied from the limitations of a will, as where a devise is of Black Acre to A. and of White Acre to B. in tail, and if they both die without issue, then to C. in fee: A. and B. shall have cross remainders by implication; and on failure of either's iffue, the other or his issue shall take the whole, C.'s remainder being postponed till failure of the issue of both, Holmes v. Willett, I Freem. 483. fee also Phipard v. Mansfield, Cowp. 797. and cases there cited. And upon the indulgence afforded by courts both of law and equity to the real intention of the testator, is founded the dostrine of executory devifes, by which certain limitations of a future estate or interest in lands or chattels are in the case of a will allowed to prevail, contrary to the rules of limitation in conveyances at com-See Mr. Fearne's Effay on Con. Rem. and Executory Devises.

⁽q) Different opinions have been entertained respecting the effect and operation of repugnant clauses in a will. Lord Coke holds, that the latter clause shall control

ed first a devise of the rent to J. N. and afterwards of the land to J. S. charged with the rent (2). For a will is for the benefit of the testator, and at most implies only a consideration of love and affection, and therefore shall not be taken strongest against the testator, or most beneficial for the devisee, but equally. But a deed imports a consideration (3), and is for the advantage of the grantee alone: and therefore if there be any doubt in the sense, the words are to be taken most forcibly against the grantor (r), that he may

(2) Paramour v. Yardley, Plowd. 539. Weldon v. Elkington, Plowd. 523. Lanc. 118.

(3) Plowd. 308.

control the first; for cum duo inter se pugnantia reperiuntur, in testamento, ultimum ratum est." Co. Litt. 112. b. And in Carter v. Kingstead, Owen, 84. Periam J. held, that the repugnance of the clauses would render both void; whilst others maintain, (and the opinion is supported by the greatest number of authorities,) that the two devisees shall take in moieties as jointenants, or tenants in common, according to the words used in limiting the two estates. See margin, note (1), Ridout v. Pain, 3 Atk. 493. Mr. Hargrave's note (1), Co. Litt. 112. b. 113. a.

(r) Lord Bacon has illustrated this rule of construction, verba fortius accipiuntur contra proferentem, by a variety of cases, and observes, "that it is a rule drawn G g 2 from (4) Shepherd's Touchstone, 87. 2Bla. Com. 380.

(5) Cother v. Merrick, Hard. 89 94. Bridg. 101.

(6) Thurnam v. Cooper, Cro. Jac. 476, 477. 2 Roll's Ab. 66. pl. 9.

not by the obscure wording find means to evade it (4). And the grantor cannot, by any act of his, derogate from his grant, or contradict in the latter part what he had passed by the premisses (5), for his act shall be construed most forcibly against himself. But the latter part may qualify and explain the premisses (6), or enlarge them; for no word shall be rejected that may properly fland; but not abridge, or con-

from the depth of reason, but the last to be resorted to, and never to be relied on but where all other rules of exposition of words fail; and if any other come in, this must give place." Maxims, reg. 3. This rule must also be understood subject to the distinction between an indenture and a deed poll; the latter is executed by the grantor alone, and the words are his only, and shall therefore be taken most strictly against him; but in an indenture executed by both parties, they are to be confidered as the words of both, and therefore not to be construed more strongly against the one, or more favourably for the other, Brownrig v. Baston, Plowd. 134. And even in the cases to which the rule is applicable, it must be so construed as not to work a wrong, ea est accipienda interpretatio quæ vitio caret; for "it is a general rule, that when the words of a deed, or of the parties without deed, may have a double intendment, and the one standeth with law and right, and the other is wrongful and against law, the intendment that standeth with law shall be taken." Co. Litt. 42. a. b. 183. a.

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tradict, or control them (7); for this would be repugnant (s). But this is meant only of divided clauses; for of one clause carried on with a connection till the whole is finished, the law is otherwise (8). And indeed in one sentence it is in vain to imagine one part before another, since the mind of the author comprehends them at once.

(7) Altham's cafe, 8 Rep. 154 Co Litt. 229. a.

(8) Co. Litt, 21. 2. Leigh v. Brace, 5 Mod. 268.

(s) As to what clauses shall be deemed repugnant, and what though restrictive shall prevail, see 2 Roll's Ab. 63. Co. Litt. 146. 2 Bac. Ab. 665. 14 Vin. Ab. Grants, 142.

SECTION XX.

AND so much for the discovery of the meaning where the consent is declared by express signs. Yet sometimes it is sufficiently gathered from the nature and circumstances of the business itself. What we most commonly meet with of this kind is, that when some principal and leading contract has been entered upon

upon by express agreement, some other tacit pact is included in it, or slows from it, as we cannot but apprehend upon considering the nature of the affair. It is upon this the principle of law is sounded, that whenever the law, or the party, giveth any thing, it giveth implicitly whatever is necessary for the taking and enjoying of the same (t). But things appendant, appurtenant, or regardant, do not pass without the words cum pertinentiis (u); because

(t) Cuicunque aliquid conceditur, conceditur etiam et id, fine quo res ipsa non esse potuit, Lysord's case, 11 Rep. 52. a. therefore by the grant of a piece of ground, is granted a way to it; by grant of trees, is granted a power to cut them down, and to go over the land with carts to carry them away. So by a grant of mines, is granted power to dig them; and by a grant of sish in a man's pond, is granted the right to come upon the banks and sish for them: but the grantee, in such case, cannot justify digging a trench to let the water out and take the sish, if he could take them by nets or other means, Finch's Law, 63. Shepherd's Touchstone, 89.

(u) This opinion feems formerly to have prevailed. Br. Grant, pl. 87. Higgins v. Grant, Cro. Eliz. 18. but Lord Coke holds, that by the grant of a manor, without faying cum pertinentiis, things regardant and appendant will pass as incidents, Co. Litt. 307. a. and the

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because they are not expressed nor implied by law in the grant. And there is no fort of covenant in which it is not understood, that the one party is bound to deal honestly and fairly by the other, and to do whatever equity may demand. As if the price be omitted, it is to be estimated at the common rates (v). So the time of payment or delivery being added in favour of him who is obliged (1), he is bound to do it, or pay, immediately (2), unless it requires a necessary delay. So if the place be omitted, it shall be delivered at the place where it happens to be at the time (x). In the same manner most covenants

(1)Domat. B. 1ti. 1. f. 3. 5.
(2)Moore, 472.
Dyer, 30.
pl. 203
Co.Litt. 208. a.
Bridgeman, 20.
16Vin.Ab.267.
Lanford v.
Tyler,
6 Mod. 162.
Shepherd's
Touchstone,
136. 377.

the authorities stated in 2 Bacon's Ab. 669. Shepherd's Touchstone, 89. 14 Vin. Ab. 118. seem to furnish a conclusive authority to such opinion.

- (v) This case falls within the second class of implied contracts enumerated by Sir William Blackstone, "which class extends to all presumptive undertakings or assumptites, which, though perhaps never actually made, yet constantly arise from this general implication and intendment of courts of judicature, that every man hath engaged to perform what his duty or justice requires." See 3 Com. 161.
- (x) As to the time when, and place where, conditions are to be performed, there being no time or place limited

venants leave fome slight exceptions and conditions to be understood; (but in all these it is strictly required, that not so much as one probable conjecture appear to the contrary, tale oportet sit quod pro naturâ actus credi debeat exceptum;) for otherwise it would be easy to thrust a troublesome obligation upon a man against his will: yet were too great a licence given to these secret and implied reserves, there is scarce any covenant which might not be either annulled or evaded by them.

limited by the deed or agreement, fee 5Vin. Ab. Condition, 189. Shepherd's Touchstone, 136. 377.



END OF THE FIRST VOLUME.